S. HRG. 101-1180

FORT HALL INDIAN WATER RIGHTS ACT OF 1990

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON

ENERGY AND NATURAL RESOURCES

AND THE

SELECT COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 2870

TO APPROVE THE FORT HALL INDIAN WATER RIGHTS SETTLEMENT, AND FOR OTHER PURPOSES

SEPTEMBER 13, 1990

Printed for the use of the Committee on Energy and Natural Resources and the Select Committee on Indian Affairs

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FORT HALL INDIAN WATER RIGHTS ACT OF 1990

THURSDAY, SEPTEMBER 13, 1990

U.S. SENATE, SUBCOMMITTEE ON WATER AND POWER, COMMITTEE ON ENERGY AND NATURAL RESOURCES, AND THE SELECT COMMITTEE ON INDIAN AFFAIRS,

Washington, DC.

The subcommittee and the select committee met, pursuant to notice, at 8:31 a.m. in room SD-562, Dirksen Senate Office Building, Hon. Bill Bradley presiding.

OPENING STATEMENT OF HON. BILL BRADLEY, U.S. SENATOR FROM NEW JERSEY

Senator BRADLEY. The Subcommittee on Water and Power will come to order.

Today we are very privileged to have been joined by the Select Committee on Indian Affairs for a joint hearing on S. 2870, legislation introduced in July by Senators McClure and Symms.

S. 2870 would ratify and help implement a settlement agreement concerning the Shoshone-Bannock Tribes' rights to water in the Snake River basin in Idaho. The Bureau of Reclamation facilities would be used to implement key provisions of the agreement.

We will hear testimony today in support of the bill and the settlement agreement from the Department of Interior, the Shoshone-Bannock Tribes, the State of Idaho, and non-Indian water users.

Costing $22 million and calling for no new dams, this settlement is relatively inexpensive to the Federal taxpayer and to the environment. Unlike some recent Indian water settlements which involve Federal contributions of hundreds of millions of dollars for the construction of water projects with little economic justification and substantial environmental costs, this agreement relies on creative exchanges of water supplies, permitting the entire region to use available water resources more efficiently, with little or no added financial or environmental costs.

I venture to predict that the parties to this agreement will enjoy its benefits sooner, longer, and with far more certainty than parties to settlements built around new dams, new depletions, and new Federal appropriations.

S. 2870 offers substantial tangible benefits to the Tribes and others by recognizing the Tribes' right to market water to other users. By placing tribal water on the market and authorizing the use of uncontracted Federal storage capacity, this legislation would appear to provide the means whereby non-Indian water users will

be able to mitigate for or avoid any adverse effects of the agreement on their water supplies.

Marketing of tribal water rights downstream may well provide a fundamental tool for use in restoring and protecting Snake River salmon and steelhead runs, including those recently proposed for listing under the Endangered Species Act.

If any component of this package appears to be lacking, in my opinion it is the cost-sharing component. Interpreting the bill and settlement agreement generously, it seems to me the State of Idaho is obliged to provide something between 1 and 2 percent of the costs of the settlement. I'm sure that the subcommittee and the committee can look to Senator McClure and to our witnesses to help us understand the bill's cost-sharing formula.

We are not scheduled to hear from the Department of Justice this morning, so let me just take a moment to express my own appreciation and congratulations to the Justice Department's lead attorney on this matter, Peter Monson, who I understand contributed substantially to the settlement's innovative character.

Let me assure Senator McClure and our witnesses that, even though there are only a few weeks left in this session, assuming any concerns held by the Indian Affairs Committee can be satisfied, I would hope we will be able to move this legislation. I am very pleased that we are joined by the chairman of the Indian Affairs Committee, with whom we have joint jurisdiction and a joint hearing, Senator Inouye.

[The prepared statement of Senator Bradley and the text of S. 2870 follow:]

PREPARED STATEMENT OF HON. BILL BRADLEY, U.S. SENATOR FROM NEW JERSEY

The Subcommittee on Water and Power is privileged to be joined this morning by the Select Committee on Indian Affairs for a joint hearing on S. 2870, legislation introduced in July by Senators McClure and Symms.

S. 2870 would ratify and help implement a settlement agreement concerning the Shoshone-Bannock Tribes' rights to water in the Snake River basin of Idaho. Bureau of Reclamation facilities would be used to implement key provisions of the agreement.

We will hear testimony today in support of the bill and the settlement agreement from the Department of the Interior, Shoshone-Bannock Tribes, State of Idaho, and non-Indian water users.

The Fort Hall Indian Water Rights Agreement is, in most respects, a model Indian water rights settlement.

Costing $22 million and calling for no new dams, this settlement is relatively inexpensive to the Federal taxpayer and the environment. Unlike some recent Indian water settlements which involve Federal contributions of hundreds of millions of dollars for construction of water projects of questionable economic justification and substantial environmental cost, this agreement relies on creative exchanges of water supplies, permitting the entire region to use available water resources more efficiently with little or no added financial or environmental costs.

I will venture to predict that the parties to this wise agreement will enjoy its benefits sooner, longer, and with far more certainty than the parties to settlements built around new dams, new depletions, and new Federal appropriations.

S. 2870 offers substantial tangible benefits to the Tribes and others by recognizing the Tribes' rights to market water to other users. By placing tribal water on the market—and authorizing use of uncontracted Federal storage capacity—this legislation would appear to provide the means whereby non-Indian water users will be able to mitigate for or avoid any adverse effects of the agreement on their water supplies.

Marketing of tribal water rights downstream may well provide a fundamental tool for use in restoring and protecting Snake River salmon and steelhead runs, including those recently proposed for listing under the Endangered Species Act.

If any component of this package appears to be lacking, it is in the area of cost-sharing. Interpreting the bill and settlement agreement generously, it seems that the State of Idaho is obliged to provide something between one and two percent of the costs of the settlement. I am sure the Subcommittee and Committee can look to Senator McClure and our witnesses to help us understand the bill's cost-sharing formula.

That matter aside, I want to offer my congratulations for a job well done to those many individuals who devoted thousands of hours over the past five years to bring this agreement together.

We are not scheduled to hear from the Department of Justice this morning, so let me take a moment now to express my congratulations to the Justice Department's lead attorney on this matter, Peter Monson, who, I understand, contributed substantially to the settlement's innovative character and basic fairness.

In closing, let me assure Senator McClure and our witnesses that I am hopeful the Congress will be able to ratify the Fort Hall Indian Water Rights Agreement in the few weeks that remain of this session, assuming that any concerns held by the Indian Affairs Committee can be satisfied.

II

101ST CONGRESS
2D SESSION

S. 2870

To approve the Fort Hall Indian Water Rights Settlement, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 18 (legislative day, JULY 10), 1990

Mr. MCCLURE (for himself and Mr. SYMMS) introduced the following bill; which was read twice and referred jointly to the Committees on Energy and Natural Resources and the Select Committee on Indian Affairs, with instructions that when one committee reports the other committee have fifteen days to report or be discharged

---

A BILL

To approve the Fort Hall Indian Water Rights Settlement, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fort Hall Indian Water Rights Act of 1990".

SEC. 2. DEFINITIONS.

For the purposes of this Act, and for no other purposes—

(a) The term "Agreement" means the "1990 Fort Hall Indian Water Rights Agreement" between the

★(Star Print)

State of Idaho, the Shoshone-Bannock Tribes, the United States, and other participating parties.

(b) The term "Committee of Nine" means the advisory committee of Water District 01, which is the instrumentality created by the Director of the Idaho Department of Water Resources pursuant to Idaho Code section 42–604.

(c) The term "Final Decree" means the partial decree confirming the Tribal water rights described and quantified in article 7 of the Agreement to be entered after the date of enactment of this Act and following submission of the Agreement as provided for in article 10 of the Agreement in Civil Case Numbered 39576 filed in the Fifth Judicial District Court of the State of Idaho in and for Twin Falls County on June 17, 1987, entitled In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System.

(d) The term "Fort Hall Indian Irrigation Project" means the Federal project constructed to provide water for the irrigation of Reservation lands and certain ceded lands.

(e) The term "Idaho Water Resource Board" means the Idaho State Water Resource Agency consti-

tuted in accordance with Idaho Const. article XV, section 7, or any successor agency.

(f) The term "Indian" means any person who is a member of a tribe recognized as eligible for special programs and services provided by the United States because of the person's status as an Indian; is recognized as an Indian under Tribal law; or holds or is recognized by the Secretary as eligible to hold restricted trust property on the Reservation.

(g) The term "Indian lands" means (i) all lands within the exterior boundaries of the Reservation that are held in trust for or owned by the Shoshone-Bannock Tribes or an Indian and (ii) those lands outside the exterior boundaries of the Reservation held in trust for or owned by the Shoshone-Bannock Tribes or held in trust for or owned subject to a restriction on alienation by a member of the Shoshone-Bannock Tribes.

(h) The term "Michaud Act" means the Act of August 31, 1954, chapter 1159, (68 Stat. 1026).

(i) The term "Michaud Contract" means that Memorandum Agreement of April 25, 1957, between the Bureau of Reclamation and the Bureau of Indian Affairs relating to the water supply for the Michaud Division.

(j) The term "Michaud Division" means that division of the Fort Hall Indian Irrigation Project authorized by the Act of August 31, 1954, chapter 1159, Stat. 1026.

(k) The term "Party" or "Parties" means any entity or entities that are party to the Agreement.

(l) The term "Reservation" means the Fort Hall Indian Reservation.

(m) The term "Secretary" means the Secretary of the Interior.

(n) The term "Tribes" or "Tribal" means the Shoshone-Bannock Tribes, its members and its allottees.

(o) The term "Upper Snake River Basin" means that portion of the Snake River Basin upstream from the Hells Canyon Dam, the lowest of the three dams authorized as Federal Energy Regulatory Commission Project Numbered 1971.

SEC. 3. FINDINGS.

The purpose of the Fort Hall Indian Water Rights Settlement Act of 1990 is to achieve a fair, equitable and final settlement of all claims of the Shoshone-Bannock Tribes, its members and its allottees and the United States on behalf of the Shoshone-Bannock Tribes, its members and its allottees to water rights in the Upper Snake River Basin.

SEC. 4. RATIFICATION OF AGREEMENT.

The Agreement is hereby approved, ratified, and confirmed. The Secretary is authorized and directed to implement the Agreement on behalf of the United States.

SEC. 5. PROTECTION OF EXISTING USES.

(a) CONTRACT FOR STORAGE SPACE.—The Secretary is authorized and directed to contract with the Idaho Water Resource Board or another appropriate contracting entity acceptable to the Committee of Nine for 18,900 acre feet (hereinafter referred to as "AF") of storage space in the Palisades Reservoir and the 80,500 AF of storage space in the Ririe Reservoir: *Provided,* That the contracting entity makes application for the noncontracted storage space within one year of the date of this Act and the contracting party agrees to pay all operation and maintenance costs associated with the space. The repayment obligation associated with the construction costs for such noncontracted storage space is hereby deemed repaid by this Act. All exemptions that result from such a repayment shall be deemed to be applicable without further qualification on the part of such contracting entity and: *Provided, further,* That with respect to subsequent users of this water, the reclamation laws shall apply only to the extent such laws would have applied to such subsequent users prior to the date of this Act.

(b) LIMITATION ON SETTING ASIDE FINAL DECREE.—Neither the Committee of Nine nor the State

shall have the right to set aside the Final Decree because either fails to make application for the storage space referred to in subsection (a) of this section within one year of the date of this Act.

SEC. 6. USE, TRANSFER, AND LEASE OF TRIBAL WATER RIGHTS.

(a) TRANSFER AND LEASE OF TRIBAL WATER RIGHTS WITHIN THE RESERVATION.—The Tribes shall have the right to transfer or lease within the Reservation all or any part of the Tribal water right confirmed in the Final Decree on the terms and conditions set forth in article 7 of the Agreement.

(b) RENTAL OF THE TRIBES FEDERAL CONTRACT STORAGE WATER.—The Tribes shall have the right to rent, pursuant to Idaho Code sections 42–1761 through 42–1765 as specified in article 7 of the Agreement, the water accruing to Federal storage space held in trust for the Tribes under the Michaud Act.

(c) INSTREAM FLOWS.—The Tribes shall have the right to use any or all of the water accruing to Federal storage space held in trust for the Tribes under the Michaud Act for instream flows for river reaches on or adjacent to the Reservation and up to 15,000 AF per year of the storage water rights described in articles 7.1.19 and 7.1.20 of the Agreement for instream flows in reaches of the Blackfoot River on

the terms and conditions set forth in article 7.4 of the Agreement.

(d) REQUISITE CONGRESSIONAL APPROVAL.—Ratification of the Agreement as provided for by section 4 of this Act shall constitute the congressional approval, to the extent it is required by Federal law, of the uses described in subsections (a), (b), and (c) of this section.

(e) AMENDMENT OF MICHAUD ACT AND CONTRACT.—The Michaud Act and the Michaud Contract are hereby amended to the extent necessary to authorize the uses described in subsections (a), (b), and (c) of the proprietary rights described in article 7 of the Agreement.

(f) NO ALIENATION OR TAXATION OF PROCEEDS.—The proceeds from leasing water pursuant to subsection (a) of this section or from renting all or any part of the water accruing to the Federal contract storage space pursuant to subsection (b) of this section shall not be subject to any form of taxation or alienation by either the State or the United States.

(g) NO FORFEITURE, ABANDONMENT, LOSS OR CONSTRAINTS ON INCOME.—The Tribes' exercise of the rights described in subsections (a), (b), and (c) of this section or nonuse of the Tribal water rights shall in no event be construed or interpreted as any forfeiture, abandonment, relinquishment, or other loss of all or any part of the Tribal water

rights. Nor shall the exercise of the rights described in subsections (a) and (b) of this section be subject to any constraints on the amount of income or other compensation received by the Tribes.

(h) LIMITATION ON OFF-RESERVATION USE.—Except as authorized by this section, no Tribal water rights or water described in the Agreement may be sold, leased, rented, transferred, or otherwise used off the Fort Hall Indian Reservation.

SEC. 7. CONTRIBUTION TO SETTLEMENT.

(a) TRIBAL DEVELOPMENT FUND.—There is hereby authorized to be appropriated to the United States Department of the Interior Bureau of Indian Affairs $2,000,000 each year for the five fiscal years following the effective date of this Act for payment to the Tribal Development Fund, which the Secretary is authorized and directed to establish for the Shoshone-Bannock Tribes. Within sixty days of appropriation of moneys for the Tribal Development Fund, the Secretary shall allocate and make payment to the fund. Once the funds are deposited into the Tribal Development Fund, the Secretary shall disburse the funds to the Tribes upon request.

(b) RESERVATION WATER MANAGEMENT SYSTEM.—There is hereby authorized to be appropriated to the United States Department of the Interior Bureau of Indian Affairs

the sum of $2,000,000 to be paid in the first fiscal year following the effective date of this Act and an additional $5,000,000 payable in not less than equal annual installments in not more than a twenty-year period following the effective date of this Act for use by the Tribes for development of a Reservation water management system. Within sixty days of appropriation of moneys for the Reservation water management system, the Secretary shall allocate and make payment to the Tribes for the purposes described in this section.

(c) ACQUISITION OF LANDS, GRAZING RIGHTS, AND IMPROVEMENTS.—There is hereby authorized to be appropriated to the United States Department of the Interior Bureau of Indian Affairs $5,000,000 for the primary purposes of acquiring for the Fort Hall Indian Irrigation Project available lands and grazing rights adjacent to Grays Lake to enhance the operation and management of the project and of making related improvements as well as providing collateral benefits for the operation of the United States Fish and Wildlife Service Refuge at Grays Lake.

(d) LIMITATION ON PER-CAPITA DISTRIBUTIONS.—Under no circumstances may any appropriated funds authorized by subsections (a), (b), and (c) of this section be distributed on a per capita basis to members of the Tribes.

(e) LIMITATION ON SETTING ASIDE FINAL DECREE.—Neither the Tribes nor the United States shall have the right to set aside the Final Decree because Congress fails to appropriate the funds authorized by subsections (a), (b) or (c) of this section or because the United States fails to acquire the grazing allotments adjacent to Grays Lake.

(f) TRUST RESPONSIBILITY.—Nothing in this Act shall be construed or interpreted to alter the future trust responsibility of the United States to the Tribes nor to prohibit the Tribes from seeking additional authorization or appropriation of funds for Tribal programs or purposes.

SEC. 8. WAIVER OF CLAIMS.

(a) GENERAL AUTHORITY.—Upon the effective date of the Agreement, the Tribes and the United States shall be deemed to have waived and released any and all water rights or claims to water rights of the Tribes, its members and its allottees from any source within the Upper Snake River Basin other than those set forth in article 7 of the Agreement. This release shall not apply to water right claims under state law of Tribal members for lands not defined as Indian lands for purposes of this Act nor to any other Indian tribe or to any Federal agency other than the Bureau of Indian Affairs, Fort Hall Indian Agency.

(b) WAIVER OF CLAIMS AGAINST THE UNITED STATES.—In consideration of performance by the United

States of all actions required by the Agreement and this Act, including the congressional authorization, appropriation, and payment of any funds authorized in section 7 of this Act, the Tribes shall be deemed to have executed in return a waiver and release of any and all existing claims against the United States arising in whole or in part from or concerning water rights finally settled by the Agreement and for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir.

(c) WAIVER OF CLAIMS AGAINST NON-FEDERAL PERSONS.—Upon entry of the Final Decree confirming the Tribal water rights, the United States and the Tribes agree not to make any claims against, or seek compensation from, any non-Federal person for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir.

SEC. 9. INDIVIDUAL MEMBERS AND ALLOTTEES OF THE TRIBES.

The water rights described in the Agreement and confirmed in the Final Decree are in full satisfaction of all water right claims of members of the Tribes and allottees for Indian lands in the Upper Snake River Basin. If any Tribal member or allottee is decreed a water right for Indian lands in Civil Case Numbered 39576 filed in the Fifth Judicial District Court of the State of Idaho in and for Twin Falls County on

June 17, 1987, entitled In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System, there shall be a corresponding reduction made in the Tribal water rights set forth in the Agreement and the Final Decree.

SEC. 10. EFFECTIVE DATE.

(a) DISBURSEMENT OF FUNDS UPON EFFECTIVE DATE.—The monies appropriated pursuant to the authorization in section 7 of this Act shall not be disbursed until such time as the Agreement becomes effective. If the Agreement does not become effective, the monies shall be returned to the General Fund of the Treasury, and the Agreement may be voided by any party to the Agreement.

(b) FORCE AND EFFECT.—No provision of this Act shall be of any force unless the Agreement becomes effective as provided by article 18 of the Agreement.

SEC. 11. DISCLAIMER.

(a) GENERAL DISCLAIMER.—Nothing in the Agreement or this Act shall be construed in any way to quantify or otherwise affect the water rights or water right claims of the city of Pocatello, Idaho or of any Indian tribe, band, or community, other than the Shoshone-Bannock Tribes.

(b) RESERVATION OF TRIBAL CLAIMS.—Nothing in this Act shall be construed to waive any water rights or water right claims of the Tribe or the United States on behalf

of the Tribes except as set forth in the Agreement. Nor shall anything in the Agreement or this Act affect the water rights or water right claims of any Federal agency, other than the Bureau of Indian Affairs, Fort Hall Indian Agency.

(c) RESERVATION OF RIGHTS.—The parties expressly reserve all rights not granted, recognized or settled by the Agreement or this Act.

(d) DISCLAIMER REGARDING OTHER AGREEMENTS.—Except as expressly provided in this Act, nothing herein shall be considered to amend, construe, supersede or preempt any State law, Federal law, tribal law or interstate compact that pertains to the Snake River or its tributaries.

SEC. 12. PROTECTION OF TRIBAL WATER RIGHTS.

The Tribal water rights confirmed by the Final Decree shall bind and insure to the benefit of the Tribes and shall not be taken from them absent their consent and payment of just compensation.

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STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Senator INOUYE. Thank you very much, Mr. Chairman. If I may speak on behalf of the Select Committee on Indian Affairs, I am extremely pleased to welcome the parties to the Fort Hall Indian water rights settlement to this joint hearing. I wish to commend all of you for what I know has been a challenging and sometimes frustrating effort to achieve consensus on an issue that is of significant importance to the State of Idaho, the Shoshone-Bannock Tribes, and the United States.

So I congratulate all of you and I thank you for the long hours, days, weeks, and years that you have spent to put this to this shape for this day.

Mr. Chairman, I would like to tell you that I had an opportunity to review the bill and on the whole I find it to be not only a good bill, but a model for other settlements. But I do have one major concern, which I believe I should share with you.

Over the years, our two committees have acted upon a number of measures that propose to settle water rights of Indian nations. In each of these measures, and I cannot think of any exception to that, there has been some protection to assure that a tribe does not release its legal claims unless all parties have performed their duties and responsibilities under the agreement and the act which implements the agreement in the case of the United States, its performance is customarily associated with some specific duties to be undertaken, and the appropriation of funds serves as the Federal contribution toward settlement.

Usually a tribe's claims are deemed to be released and waived, not upon the authorization of appropriate funds, but on the actual appropriation of funds and the availability of such funds for obligation. In some instances, there is a penalty imposed upon the United States if the Congress fails to appropriate the funds that comprise the Federal contribution.

I am sorry to say, I found neither of these protections in the bill that is before us. But I have been assured that all the parties are aware of this and they are at this moment working on some solution to resolve this matter.

So if I may, Mr. Chairman, with your permission, have the remainder of my statement made part of the record and once again congratulate Senator McClure and his staff and all of those who are involved in this for coming forth with what I consider to be a model solution.

[The prepared statement of Senator Inouye follows:]

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

On behalf of the Select Committee on Indian Affairs, I am pleased to welcome the parties to the Fort Hall Indian water settlement to this joint hearing. I want to commend all of the parties for what I know has been a challenging and undoubtedly sometimes frustrating effort to achieve consensus on an issue that is of significant importance to the State of Idaho, the Shoshone-Bannock Tribes, and the United States. I congratulate all of you, and I thank you for the long hours, days, weeks and years you have put into this day.

I have had an opportunity to review the bill, and on the whole, I find it to be not only a good bill, but a model for other settlements. I do however have one major concern that I must share with you.

Over the years, our two committees have acted upon a number of bills that propose to settle water and land claims of Indian Nations. In each of these bills, and I cannot think of one exception, there has been some protection to assure that a tribe does not release its legal claims until all parties have performed their duties and responsibilities under the agreement and the act which implements the agreement. In the case of the United States, its performance is customarily associated with some specific duties to be undertaken and the appropriation of funds which serves as the Federal contribution to the settlement.

Usually, a tribe's claims are deemed to be released or waived not upon the authorization to appropriate funds, but on the actual appropriation of funds and the availability of such funds for obligation. In some instances, there is a penalty imposed upon the United States, if the Congress fails to appropriate the funds that would comprise the Federal contribution. I find neither of these protections in the bill that is before us today.

Section 7(e) provides that "Neither the tribes nor the United States shall have the right to set aside the final decree because Congress fails to appropriate the funds authorized by subsections (a), (b) or (c) of this section or because the United States fails to acquire the grazing allotments adjacent to Grays Lake."

Section 8(b) provides that "In consideration of performance by the United States of all actions required by the Agreement and this Act, including the congressional authorization, appropriation, and payment of any funds authorized in section 7 of this Act, the tribes shall be deemed to have executed in return a waiver and release of any and all existing claims against the United States arising in whole or in part from or concerning water rights finally settled by the agreement and for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir."

Read together, I think these two sections, at best, create an ambiguity. The funds authorized in this bill are to be appropriated over a twenty-year period. Reading section 8(b), I would take that to mean that the tribe will not be deemed to release any and all of its existing claims until the year 2012. Yet, I am advised that the parties to the Agreement would expect that all parties would have ratified the Agreement within the next two years, and that thereafter, a partial final decree would be sought from the court—thereby triggering section 7(e) which provides that neither the tribes or the United States can set aside the decree because Congress fails to appropriate the funds.

Now I know that the manner in which the funding is structured in the bill is probably more a function of directions from the Office of Management and Budget than something the parties were bargaining for, but if we are to have some finality to claims before the year 2012, or if entry of a final decree in the Snake River adjudication is to be achieved before the year 2012, in my view, this bill is going to have to be amended.

I have expressed my concern to the tribes, and have asked them to address this issue in their testimony. I would also like to ask the representative of the United States, the Interior Department and trustee for Indian lands and resources, to comment on this matter.

Mr. Chairman, I thank you for agreeing to this joint hearing, so that action on this bill by our respective committees can be expedited before the adjournment of the 101st Congress.

Senator BRADLEY. Very well, Senator Inouye.

Senator McClure.

STATEMENT OF HON. JAMES A. McCLURE, U.S. SENATOR FROM IDAHO

Senator MCCLURE. Thank you very much.

I would like to express my appreciation to both the chairmen that are here this morning for having arranged a joint meeting. I think that is a good way to bring us together to solve problems, if any there are, indeed not only in this instance but in others as well, rather than standing at long distance and lobbing grenades through the transom. If we can get together and talk about our concerns, we will solve problems.

I think a joint hearing is also the way in which we have the best opportunity to advance this legislation and get it passed.

I have a rather lengthy statement that does detail a great deal of the settlement. I will not take the time of the committees at this time to do that.

I do express my very strong support for this agreement as the parties have been able to forge the agreement. I want to stress that all the parties are in agreement with all of the provisions of the bill, and I hope we can keep that agreement intact as we move forward, expressing the agreement of all the parties.

The administration has been involved in the negotiations for a long period of time, trying to get us to this point where there was an agreement. The administration has been involved in those negotiations and supports the result.

The United States Department of the Interior and the Department of Justice signed the agreement and OMB has reviewed the entire agreement and supports its implementation. So I think we've got all of the hurdles that I am aware of passed.

I cannot take credit for the agreement because I did not forge the agreement. The parties themselves did over a long period of time. My role is to bring the agreement before the Congress and urge this committee and the Congress to accept what the parties themselves have over an arduous trail negotiated as a final consensus result.

I ask unanimous consent that the entire statement be placed in the record in full.

[The prepared statement of Senator McClure follows:]

PREPARED STATEMENT OF HON. JAMES A. MCCLURE, U.S. SENATOR FROM IDAHO

I want to express my strong support for S. 2870, a bill to approve the 1990 Fort Hall Indian Water Rights Agreement. The Agreement is the product of five years of intensive negotiations between the State, the Tribes, the United States and the Committee of Nine, which represented the private water users in the Snake River Basin. The Agreement will quantify all claims to the use of water by the Tribes, its members, its allottees and the United States on behalf of the Tribes, its members and its allottees from the Snake River Basin upstream from Hells Canyon Dam, the lowest of three dams authorized by FERC Project No. 1973.

The Administration has been fully involved in the negotiations from the outset and endorses the Agreement. The United States Department of the Interior and the Department of Justice signed the Agreement, and the Office of Management and Budget has reviewed the entire Agreement and supports its implementation.

Under the Agreement, the Tribes will be entitled to 581,031 acre feet of water per year. All of the natural flow and groundwater water rights will be *Winters* reserved water rights to be used solely on the Fort Hall Indian Reservation. The Agreement also quantifies supplemental storage water rights held by the United States in the Blackfoot River Basin that will be used to satisfy the Tribe's Blackfoot *Winters* water right when there is insufficient natural flow in the Blackfoot River to meet the Tribes' entitlement. Up to 15,000 acre feet per year of the Blackfoot storage water may be used for instream flows in reaches of the Blackfoot River. Finally, the Tribes will retain existing federal contract storage rights in American Falls Reservoir and Palisades Reservoir acquired pursuant to the Michaud Act. Under the terms of the Agreement, water accruing to this federal contract storage space may be rented through a Tribal water bank created pursuant to state law for any beneficial use within the Snake River Basin within the State of Idaho. Also, the Tribes may use water accruing to the federal contract storage space for instream flows on or adjacent to the Reservation.

The Agreement contains several provisions to ensure that the Tribal water rights will not adversely affect historic non-Indian water rights from sources other than the Snake River. First, the Agreement provides that the existing non-Indian water users in the Blackfoot River basin, whose rights are decreed in the Snake River Basin Adjudication (SRBA), will be entitled to continue diverting the natural flow of the Blackfoot. In times when the natural flow of the Blackfoot is insufficient to sat-

isfy the water rights of the Tribes and the non-Indian water users, the Tribes have agreed to cease use of the natural flow of the Blackfoot and to instead use their storage water entitlement from the Blackfoot Reservoir to fill their 150,000 acre feet per year *Winters* water right from the Blackfoot River Basin. In the Bannock Creek Basin, the parties will continue to allocate surface water pursuant to the Bannock Creek Decree of 1907; however, the Tribes will be entitled to the surface water remaining in Bannock Creek after the entitlements under the Bannock Creek decree are satisfied. Also, the Tribes have agreed to not assert the priority date of their Bannock Creek groundwater right against historic non-Indian groundwater rights that are decreed in the SRBA. Finally, the Agreement provides that Fort Hall Indian Irrigation Project water users shall continue to receive their full project water entitlements pursuant to their project contracts.

The Agreement recognizes a water right of 115,000 acre feet per year for the Tribes from the Snake River. Implementation of this right will adversely affect non-Indian Snake River water users. The Agreement provides for the mitigation of the impact on the non-Indian Snake River water users in two ways. First, the Agreement provides that the United States will make available to the non-Indian water users approximately 19,000 acre feet of unallocated storage space in Palisades Reservoir and 80,000 acre feet of unallocated storage space in Ririe Reservoir. Because of the hydrology, location, and junior status of the storage rights, this space will yield only approximately 40,000 acre feet of water annually. The stored water will be released as necessary to offset the impact of the Tribes' exercise of its Snake River water right. Second, the Tribes have agreed to phase-in over time 15,000 acre feet of the Snake River Tribal water right. This phase-in will provide the non-Indian Snake River water users with some time to find ways of mitigating the balance of the impact created by the Tribes' diversion of water from the Snake River.

As can be seen from the brief description of the water rights, the parties have crafted an agreement that results in a true win-win situation. Instead of seeking federal dollars to develop additional federal storage projects, the parties have allocated the available water supply in a way that ensures to the extent possible that the needs of each party are met. Where the impact on existing water users could not be avoided, the parties have fairly allocated the responsibility for mitigation among all parties.

There is perhaps no single issue more difficult to resolve in Indian reserved water right cases than the issue of administration of tribal water rights. The Agreement provides a process that ensures the delivery of water to Indian and non-Indians alike while giving due respect to the sovereignty of each party. Nothing in the Agreement, however, alters the operation of the Fort Hall Indian Irrigation Project or the Bureau of Reclamation storage facilities.

The cost sharing provided for in the Agreement is consistent with the settlement policy of the Administration. The United States will be asked to contribute approximately $22 million over a twenty year period and approximately 100,000 acre feet of unallocated storage space. Federal monies will be used to meet, in part, the federal trust responsibilities to the Tribes. As noted above, the non-Indian Snake River water users share in the cost of this Agreement because they will be required to mitigate part of the impact arising from the implementation of the Tribes' Snake River water right and to pay the operation and maintenance costs associated with the unallocated storage space they will receive. Finally, the State of Idaho will be required to contribute approximately $500,000 of cash and in kind services to the settlement. When viewed in light of past settlements, the cost sharing provided for in this Agreement is equitable and does not amount to a raid on the Federal Treasury.

There are also significant environmental benefits to the Agreement. As part of the federal cost share, the United States will acquire through purchase certain grazing rights and lands adjacent to Grays Lake. The acquisition of these grazing rights and lands will permit the storage of water in Grays Lake for a longer period of time, which not only will improve the water supply for the Reservation but will also provide significant benefits to the migratory birds that use the Grays Lake Wildlife Refuge. The renting of water accruing to the Tribal federal contract storage space for instream flows may also provide needed benefits for the anadromous fish runs of the Snake River.

In summary, the State, the Tribes, the United States and the private water users are to be commended for the creative solution they found for resolving what could have been a very divisive fight over the waters of the Upper Snake River Basin. I believe this Agreement warrants our support.

Senator BRADLEY. Thank you, Senator McClure. Your full statement will be in the record, as will the full statement of Senator Inouye.

Our first witness is Patrick A. Hayes, Deputy to the Assistant Secretary of Indian Affairs, Department of the Interior. Mr. Hayes will offer testimony.

I would like to ask the Commissioner of the Bureau of Reclamation, Mr. Dennis Underwood, if he would join Mr. Hayes at the table. Mr. Underwood does not have prepared testimony, but he is available for questions, and it would be appropriate if both officials were here at the same time.

STATEMENT OF PATRICK A. HAYES, DEPUTY TO THE ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY DENNIS UNDERWOOD, COMMISSIONER, BUREAU OF RECLAMATION; JOHN BUSHMAN, WASHINGTON OFFICE, BUREAU OF INDIAN AFFAIRS; LYNN COLLINS, REGIONAL SOLICITOR, SALT LAKE CITY, UT; AND PETER MONSON, INDIAN RESOURCE SECTION, DEPARTMENT OF JUSTICE

Mr. HAYES. Good morning, Mr. Chairmen, members of the committees. I am here to present the views of the Department of the Interior on S. 2870, a bill to approve the Fort Hall Indian water rights settlement and for other purposes.

This morning, Mr. Chairman, I am accompanied by three members of the Federal negotiating team: Mr. John Bushman, chief Federal negotiator, from the Washington office of the Bureau of Indian Affairs; Mr. Lynn Collins, Regional Solicitor, Department of the Interior, Salt Lake City, Utah; and Mr. Peter Monson, Indian Resource Section, Department of Justice.

These three gentlemen, along with the other parties to this agreement, have expended considerable time and effort and have exhibited considerable skill in drafting this fine agreement. They have agreed to be available to assist me in responding to any detailed questions which the committees may have.

Mr. Chairman, we support enactment of S. 2870, but would recommend some amendments, as we will discuss in a moment. The bill provides for the approval and implementation of the water rights agreement entered into by the State of Idaho, the Shoshone-Bannock Indian Tribes, certain private water users, and the United States.

We believe this agreement represents a new era in Indian water rights settlements, an era in which it is necessary for the parties to fashion creative solutions to water conflicts which fully utilize existing water facilities. We must also provide for cost-sharing between the Federal and non-Federal parties which recognizes the fiscal constraints at the Federal, State, and local levels.

In this agreement, the Federal Government will commit approximately $22 million over a 20-year period and approximately 100,000 acre-feet of unallocated storage space in Federal reservoirs.

The agreement has many, many positive aspects to it. With respect for today's time constraints, I will highlight only a few. This agreement innovatively resolves many of the issues regarding these

Indian water claims which may have been left unresolved had the parties litigated these issues to finality.

The agreement provides that the Tribes' Federal Indian reserved rights for surface and groundwater are quantified and defined, and allows the Tribes to use their water rights for a wide variety of purposes, while at the same time it provides the Secretary of the Interior with the authority to put existing but unused storage space in Federal reservoirs to use, so as to mitigate the effect of the quantification of the Tribes' rights on non-Indian irrigators.

The agreement provides a coordinated approach for the administration of tribal, Federal, and State of Idaho water rights which protects Indian, Federal, and State interests. The agreement recognizes an unlimited right in the Tribes to market water on the reservation and a limited, but significant, right to market water off the reservation.

The Tribes shall have the right to market for use off the reservation water accruing to the Federal storage space held in trust for the Tribes which is not used on Indian lands. The leased water may be used for any beneficial purpose, including but not limited to in-stream flows for fish and wildlife, especially anadromous fish which have suffered from insufficient flows from the Snake River in recent years.

We believe this water marketing capability will enable the Tribes to realize value from the water rights confirmed in the agreement, an objective advocated on numerous occasions by this administration.

The United States will administer the distribution of the Fort Hall Indian irrigation project water rights from the point that the water is delivered to the project facilities and will have sole responsibility for the physical operation of its Snake River diversion facilities in accordance with the Snake River watermaster's direction.

To affirm that the agreement is not intended to modify the operations of the existing Fort Hall irrigation project or the Bureau of Reclamation's Minidoka, Palisades, and Ririe Projects, we recommend that a new subsection (e) be added to the bill as following:

"Nothing in the agreement or this act shall be construed in any way to modify, diminish, alter, or otherwise affect Federal authority to operate the Fort Hall Indian irrigation project, the Minidoka, Palisades, and Ririe projects of the Bureau of Reclamation, or any other Federal facility."

The State will administer the distribution of water to non-Federal and non-tribal entities, and in so doing the State of Idaho has agreed to "ensure the delivery of water" to the Tribes, the United States, and other water users within any established water district.

The State's assumption of this responsibility will avoid the problems which have been encountered elsewhere when the responsible entity has been reluctant to ensure the delivery of tribal water where there are competing water users.

The agreement also contains significant environmental benefits. In addition to the wetlands preserved by the water exchanges in the agreement, the United States has agreed to continue to purchase lands and grazing rights around Grays Lake. S. 2870 authorizes $5 million for this purpose.

This water management scheme will increase the water storage capacity of the Fort Hall Indian irrigation project and also benefit the United States Fish and Wildlife Refuge there, which is critical habitat for the endangered whooping crane and important habitat for other migratory waterfowl.

Also, the Tribes can market some of their water into the lower Snake River, which will be of great assistance in enhancing the flows of the Snake River which are necessary for migratory salmon and steelhead.

We do recommend one substantive change to the legislation. It is found in section 7(c), regarding the acquisition of lands and grazing rights in the Grays Lake area. We believe that the legislation should more closely reflect the language of the agreement signed by the Secretary. We propose the substitute language which is found in my written testimony which I have submitted for the record.

Nothing in the Agreement or this legislation is intended to apply to Federal agencies other than the Bureau of Indian Affairs for the Fort Hall Indian Agency, nor is it intended to apply to any other Indian tribe other than the Shoshone-Bannock Tribes.

To conclude, we are of the view that important policy goals are achieved by this agreement. First, we believe that the United States' trust responsibility has been fulfilled by protecting Indian water resources.

Second, tribal self-determining decisions are reflected in the agreement.

Third, there is the assurance that the Tribes are able to realize the full value of their water rights by providing them with wet water and an opportunity to market that water for value.

Fourth, there will be a reduction of potential conflict between Indians and their non-Indian neighbors by mitigating some of the impacts of the full exercise of Indian reserved water rights upon non-Indians, many of whom rely on Federal reclamation projects for all or part of their water supplies.

Fifth and finally, this reflects the negotiation of Indian water rights claims consistent with this administration's criteria and procedures.

Mr. Chairman and members of the committees, we support the Tribes water rights settlement embodied in S. 2870 and we urge the Congress to act expeditiously and favorably on this legislation. We are committed to seeing that the Tribes receive the benefits as negotiated in this agreement. We respectfully request you to join us in honoring this commitment to the Shoshone-Bannock Tribes.

This concludes my prepared statement. I would be pleased to answer any questions the committees may have.

[The prepared statement of Mr. Hayes follows:]

PREPARED STATEMENT OF PATRICK A. HAYES, DEPUTY TO THE ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Good morning Mr. Chairmen, and members of the Committees, I am here to present the views of the Department of the Interior on S. 2870, a bill "To approve the Fort Hall Indian Water Rights Settlement, and for other purposes."

We support enactment of S. 2870 but recommend certain amendments discussed below. The bill provides for approval and implementation of the water rights Agree-

ment entered into by the State of Idaho, the Shoshone-Bannock Indian Tribes, certain private water users, and the United States.

Unlike many Indian water rights agreements brought before the Congress for consideration, we believe this Agreement ushers in a new era in Indian water right settlements—an era in which it will be necessary for negotiating parties to fashion creative solutions to water conflicts fully utilizing existing water facilities rather than calling for construction of unnecessary new storage facilities with high financial and environmental costs. The Agreement also provides for cost sharing between the Federal and non-Federal parties that recognizes the fiscal constraints at the Federal, State and local levels. The Federal Government will commit approximately $22 million over a twenty year period and approximately 100,000 acre feet of unallocated storage space.

This Agreement innovatively resolves many issues regarding these Indian water claims which may have been left unresolved had the parties litigated these issues.

The Agreement provides that the Tribes' federal Indian reserved rights for surface and ground water are quantified and defined, allowing the tribes to use their water rights for irrigation, domestic, commercial, municipal, industrial and stock watering, instream flows, and hydropower purposes. At the same time, it provides the Secretary of the Interior with the authority to put existing, but unused storage space in federal reservoirs to use so as to mitigate the effect of the quantification of the Tribes' rights on non-Indian irrigators.

The Agreement provides a coordinated approach for the administration of tribal, Federal and State of Idaho water rights which protect Indian, Federal and state interests by recognizing that each governmental entity shall be responsible for administering the distribution of water to its respective constituent water users. The Agreement also provides for greater efficiency in the use of existing facilities to enhance the environment.

The Agreement recognizes an unlimited right in the Tribes to market water on the reservation and a limited but significant right to market water off the reservation. The Agreement provides that the Tribes shall have the right to transfer or lease, within the reservation, any of the water rights confirmed to them. The Agreement also provides that the Tribes shall have the right to market for use off the reservation water accruing to the federal storage space held in trust for the Tribes which are not used on Indian lands. The leased water may be used for any beneficial purpose including, but not limited to, instream flows for fish and wildlife especially anadromous fish which have suffered from insufficient flows from the Snake River in recent years. We believe this water marketing capability will enable the Tribes to realize value from the water rights confirmed in the Agreement, an objective advocated on numerous occasions by this Administration.

For example, the Tribes or the United States will administer the distribution of all tribal water rights. The United States will administer the distribution of the Fort Hall Indian Irrigation Project water rights and the Fort Hall Agency water rights from the point the water is delivered to the project facilities, and will have sole responsibility for the physical operation of its Snake River diversion facilities in accordance with the Snake River Watermaster's direction. In this regard, the provisions of the Agreement are intended to leave intact the existing authority which the United States has over the operation of the Federal dams, diversion works, and related facilities, and over the delivery of project water to contractors pursuant to Federal and State law.

To affirm that the Agreement is not intended to modify the operations of the existing Fort Hall Irrigation Project or the Bureau of Reclamation's Minidoka, Palisades, and Ririe Projects, we recommend that new subsection 11(e) be added as follows:

"Nothing in the Agreement or this Act shall be construed in any way to modify, diminish, alter, or otherwise affect Federal authority to operate the Fort Hall Indian Irrigation Project, the Minidoka Palisades and Ririe Projects of the Bureau of Reclamation, or any other Federal facility."

The State will administer the distribution of water to non-federal and non-tribal entities, and in so doing, the State of Idaho has agreed to "ensure the delivery of water" to the Tribes, the United States and other water users within any established water district. Thus, if the Tribes decide to market some of their water to benefit instream flows for anadromous fish in the Snake River below Hells Canyon, they may do so and the State will ensure that other users, including hydropower operators, do not divert or otherwise interfere with the delivery of such water to the purchaser. The state's assumption of this responsibility will avoid the problems which have been encountered elsewhere when the responsible entity has been reluctant to ensure the delivery of tribal water where there are competing water users.

The Agreement also contains significant environmental benefits. In addition to the wetlands preserved by the water exchanges in the Agreement, the United States has agreed to continue to purchase lands and grazing rights around Grays Lake. S. 2870 authorizes that $5 million be appropriated for this purpose. This water management scheme will increase the water storage capacity of the Fort Hall Indian Irrigation Project and also benefit the United States Fish and Wildlife Refuge there, which is critical habitat for the endangered whooping crane and important habitat for other migratory waterfowl. Without the Agreement, water must be released early in the spring to provide access for cattle, instead of later in the summer when it is needed for irrigation and the waterfowl which nest there year around. Finally, permitting the Tribes to market some of their water into the Lower Snake River will be of great assistance in enhancing the flows of the Snake River which are necessary for migratory salmon and steelhead fish. The Agreement expressly provides for full compliance with all applicable environmental laws.

The Department does recommend one substantive change to the legislation. It is found in section 7(c) regarding the acquisition of lands and grazing rights in the Grays Lake area. We believe that the legislation should more closely reflect the language of the Agreement signed by the Secretary. We propose the following substitute language:

"Section 7(c). There is hereby authorized to be appropriated to the United States Department of the Interior, Bureau of Indian Affairs, $5,000,000 for the acquisition of up to 9,800 acres of lands, grazing rights and related improvements to enhance the operation and management of the Fort Hall Indian Irrigation Project, particularly through increased storage capacity and retention period of the reservoir, and the operation of the United States Fish and Wildlife Service refuge at Grays Lake."

Nothing in the Agreement or this legislation is intended to apply to Federal agencies other than the Bureau of Indian Affairs for the Fort Hall Indian Agency, nor is it intended to apply to any other Indian tribe, other than the Shoshone-Bannock Tribes. While the agreement would preclude the Shoshone-Bannock Tribes and the United States on their behalf, from making claims for instream flows which require releases of water above Hells Canyon, this provision is not applicable to other tribes, or to the United States on behalf of other tribes or Federal agencies. Similarly while the tribes and the United States on their behalf, agree not to object to certain water rights claims in the Upper Snake River basin, this provision is not applicable to the United States in any of its other capacities on behalf of other Federal agencies or tribes.

In conclusion, the Department is of the view that important policy goals are achieved by this Agreement. These goals include: (1) fulfillment of the United States trust responsibility by protecting Indian water resources; (2) promotion of tribal self-determination together with strong and responsible tribal governments; (3) assurance that the tribes are able to realize the full value of their water rights by providing them with "wet water" and an opportunity to "market" that water for value; (4) reduction of potential conflict between Indians and their non-Indian neighbors by mitigating some of the impacts of the full exercise of Indian reserved water rights upon non-Indians, many of whom rely on federal reclamation projects for all or part of their water supplies; and (5) negotiation of Indian water rights claims consistent with the Administration's criteria and procedures.

Mr. Chairmen and members of the Committees, we support the Indian water rights settlement Agreement embodied in S. 2870 and we urge the Congress to act expeditiously and favorably on this legislation. We are committed to seeing that the tribes receive the benefits as negotiated in the Agreement. We respectfully request you to join us in honoring this commitment to the Shoshone-Bannock Tribes. To do otherwise would continue, to quote the Honorable Senator from Arizona, Senator McCain, "that failing that is clearly evident in the long and shameful story of abuse and neglect that is the record of our treatment of Native Americans."

This concludes my prepared statement. I will be pleased to answer any questions the Committees may have.

Senator BRADLEY. Thank you very much, Mr. Hayes, for your testimony.

Senator Inouye, do you have any questions?

Senator INOUYE. I would like to have the Interior Department respond to my concern which I indicated in my statement. In looking over the measure, and I will read section 7(a), it provides: "Neither the Tribes nor the United States shall have the right to set aside the final decree because Congress fails to appropriate the funds au-

thorized by subsections (a), (b), or (c) of this section or because the United States fails to acquire the grazing allotments adjacent to Grays Lake."

If we authorize this measure and this measure passes, but because of fiscal constraints and such, the Persian Gulf and other matters, over the years we just do not appropriate, what happens?

This bill also calls for a final decree. The Tribes would have to give up all their claims. So if they do their side and the Government fails to do theirs, what happens?

Mr. HAYES. Mr. Chairman, with the committee's indulgence, I have the chief negotiator for the Federal negotiating team here. If permissible, I'd like to ask him to join me at the table and assist me in responding to this question. It is Mr. John Bushman, sir.

Mr. BUSHMAN. Good morning.

Senator, if I understand your question correctly, you are wondering what the force and effect of section 7(e) is going to be on the Tribes. If the Congress passes this legislation, the effect on the Tribes is going to be that they are going to waive all of their claims, and there is no provision which requires the Congress—there is no provision in the legislation which requires the Congress to fulfill its commitment to appropriate funds.

Senator INOUYE. So this measure would require the Tribes to give up their claims, but in return there is no assurance that the Congress will appropriate the funds?

Mr. BUSHMAN. Right.

Senator MCCLURE. Mr. Chairman, may I make a statement here, a very brief statement, if I might?

Senator BRADLEY. Senator McClure.

Senator MCCLURE. Because I want to be very clear about this provision, and I think what we are doing is muddying the water, if I can use that term, almost irretrievably. My understanding is that that section is intended to do and does in fact allow the Tribes to go to the Court of Claims for a claim for liquidated damages, that there is a remedy, that it is intended to provide that remedy so that the United States Government cannot fail to make good its part of this deal.

So that the Indian Tribes are fully protected. I am distressed that the administration would come here and say that there is no way for the Tribes to protect themselves, because this provision is intended to provide the Tribes with an absolute right to protect themselves.

Senator INOUYE. Unfortunately, in reading the measure I do not see any provisions that would provide this protection.

Mr. BUSHMAN. That is correct, Senator. I do not see that reading or that understanding, that the Tribes would be allowed to go to the Court of Claims.

Senator INOUYE. Can this measure be cured, this shortcoming be cured?

Mr. BUSHMAN. I believe language could be amended to cure that, yes.

Senator MCCLURE. Why would the administration negotiate on behalf of the Indian Tribes and end up with a provision that says you have got no way to protect yourself? Mr. Hayes, you indicated a moment ago you have met your trust responsibilities. Does it

meet trust responsibilities to say to the Indian Tribes, the Federal Government can violate this agreement and you have got no way to protect yourself?

Mr. HAYES. Mr. McClure, the Federal Government has on the face of the agreement met its trust responsibility to the Tribes.

Senator MCCLURE. Met it on the face of the agreement by an agreement that says if the United States Government does what it says it does you are protected, but if the United States does not do what it says it will do then you are not protected?

Mr. HAYES. The Federal Government, the Department of the Interior, is committed to seeing that the terms of this agreement are fulfilled, Mr. McClure.

Senator MCCLURE. By a provision that allows the Congress of the United States to fail to live up to the terms of the agreement with no protection for the Indians?

Mr. HAYES. We will do everything that we can to see that the Congress comes along with the administration during the course of seeking the funds to fulfill all the terms of this agreement.

Senator MCCLURE. If I may, Mr. Chairman, that is not what I think the agreement says. It is certainly not what this Senator intends for it to say.

I expect the United States Government to be bound by the agreement which it signs.

Senator BRADLEY. Senator Inouye.

Senator INOUYE. Mr. Chairman, I agree with Senator McClure that the intention that he as an author had very clearly was that the Government of the United States should be bound by this agreement.

Would it help if we appropriated the funds, the money, up front? Then the agreement is final, is it not?

Mr. BUSHMAN. Yes, it would become final if the funds are appropriated at the front of it.

Senator MCCLURE. That is not quite true, unless you make an advance payment, because there would still be the administrative action of the Government to make the payments required, even if the money was available and sitting in a fund.

Senator BRADLEY. If the Senator would yield, let Senator Inouye.

Senator INOUYE. Would it be possible, if we made an arrangement where funds were appropriated and placed in trust somewhere, to be made available say in 1992 or 1993?

Mr. HAYES. I believe, Senator Inouye, that we would probably support that as trustee. However, decisions on the Federal budget, as you are aware, require consultation with other departments within the administration. But as trustee, I believe that we would support something like that.

Senator BRADLEY. Senator McClure.

Senator MCCLURE. Mr. Chairman, we will get to the other parties that negotiated this agreement and get their understanding of the agreement, too, on the record. I think it would be helpful when we get to that point.

I think, if my understanding is correct, the agreement and the legislation is intended to vest in the Tribes the right to bring suit against the Federal Government if the Federal Government fails to

live up to its obligations under the agreement, including the payments that are carried forward here.

If indeed that reading is correct, then you do not have to put the funds in escrow, so to speak, because the United States Government can be sued at any time in the Court of Claims to make good on the periodic payments that are required under the agreement.

I do not have any particular feel as to the better way to do that. But I think we may have a problem with the OMB if we try to advance the funds for the entire agreement in this fiscal year. I hope not. I think there is a mechanism in the bill as I understand it that protects the tribes.

But I will look forward to hearing from the State and from the Tribes and from the others who will testify with respect to their understanding of the agreement and of the legislation.

Senator BRADLEY. Senator Reid.

STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM NEVADA

Senator REID. Thank you, Mr. Chairman.

I feel, I guess, like the negotiators here trying to get to the meeting today. First it was scheduled in 366, then it was scheduled for 9 a.m. Anyway, I am here. I am sorry I am late, Mr. Chairman, because I did want to say something. I will do that now just briefly. Regardless, I am happy to be here, no matter how long it took to get here, to hear testimony on the Fort Hall Indian water settlement in Idaho.

The reason that I wanted to make an appearance here today is to indicate that there are other settlements that are around. I have worked almost 4 years on one in northern Nevada that has involved thousands of hours of work by the negotiators, hundreds of hours by me. So I understand the interest that Senator McClure has in this bill, because he spent considerable time on the bill himself.

I am personally looking forward to a hearing that is going to take place next week.

These microphones are also part of the game, in addition to room changes.

I look forward to the Energy Committee's reporting out my Truckee River settlement next Wednesday. But you know, the funny thing that I have discovered, Mr. Chairman, over the years in watching settlements, and especially settlements that deal with the scarce commodity we have in the West, namely water, is that they are something like children: No matter how objective that one tries to be, no one else seems quite as deserving as their own.

The result is that we seem to spend a lot of time trying to convince other members of the worthiness of our own settlement proposals, and no matter how persuasive our arguments we can never be sure of success, particularly with the limited time available for action. Always these things seem to come at the end of the year.

We are all aware that an objection by a Senator or a small group of Senators makes it very difficult for these settlements to pass.

So I am here, Senator McClure, basically to indicate that I do not know much about your water settlement, but I will bet you have spent a lot of time on it and I will bet it is a good one, and I think

that maybe you and I can sign a pact to maybe try to tie all these things together and get them out of here, because some of these things have been here a long, long time. In Nevada, the water wars we have been trying to end for over 100 years.

So I am here basically to indicate that I do not know much about Fort Hall, never been there, but I bet you spent a lot of time on this settlement agreement.

Senator BRADLEY. Thank you very much, Senator Reid.

Senator Burns.

Senator BURNS. I have nothing, no statement.

Senator BRADLEY. I would like to just ask a few questions if I could before I move on to the panel. How will NEPA and the Endangered Species apply to this?

Mr. HAYES. They would both apply, Senator.

Senator BRADLEY. Could you tell me the methodology used to calculate the local cost share?

Mr. HAYES. Senator Bradley, if I could, I would like to ask Mr. Bushman to respond to that.

Mr. BUSHMAN. Senator, the method by which we calculated the value of water that was going to be lost by the non-Indian irrigators above the reservation was, we collectively during the negotiations determined that there would be an approximate impact of about 100,000 acre-feet as a result of the Tribes' rights being quantified through this agreement; 100,000 acre-feet would involve natural flow water.

We then looked at what the value of that water would be and looked at the local markets for that water per acre-foot. We arrived at a conclusion that it was around $100 per acre-foot, which equates to anywhere between $23 and $25 million, depending on which discount rate you are working on or working with.

That is how we arrived at it.

Senator BRADLEY. Has OMB or the Department ever used this methodology before?

Mr. BUSHMAN. Yes, I believe they have in past settlements.

Senator BRADLEY. Could you give me two examples?

Mr. BUSHMAN. I believe in the Salt River Pima-Maricopa settlement and the San Luis Rey settlement those methodologies were used.

Senator BRADLEY. Could you tell me, those are the only two? What about Colorado River Tribes' water being used in southern California? Did they not use this methodology?

Mr. BUSHMAN. Senator, I would be guessing to answer that.

Senator BRADLEY. We have a whole series of questions related to different settlements. So perhaps, Mr. Hayes, you could provide the answer for the record.

Mr. HAYES. Yes, sir, we would be happy to provide the answer.*

Senator BRADLEY. How does the methodology used here compare with the methodology used to calculate damages suffered by Indian tribes before the Indian Claims Commission?

Mr. BUSHMAN. Senator, I cannot speak to that. I do not know how damages are calculated before that.

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* The information requested was not provided to the committees.

Senator BRADLEY. Mr. Hayes?

Mr. HAYES. I cannot answer that, either, Senator.

Senator BRADLEY. Could you answer that for the record?

Mr. HAYES. Yes, sir, we would be happy to.*

Senator BRADLEY. How about the Pacific Northwest Indian Fisheries cases, where non-Indians for years caught substantial portions of the Indian share of salmon? Would the administration propose compensation for those cases?

[No response.]

Senator BRADLEY. Would you provide the answer to that question, Mr. Hayes?

Mr. HAYES. Yes, sir.*

Senator BRADLEY. Does Idaho have a law, a statutory definition of "beneficial use"?

Mr. BUSHMAN. No.

Senator BRADLEY. It does not. Well, the agreement permits the Tribes to market and manage their water for beneficial use. If Idaho does not have a law defining what beneficial use is, the question is by what standard will beneficial use be judged?

Mr. BUSHMAN. The standard will be the beneficial use definition that is contained in the agreement, which again represents a collective definition of all the parties to the agreement.

Senator BRADLEY. So is that a Federal standard? Is that the Federal standard for beneficial use?

Mr. BUSHMAN. Yes, I would think that would be fair to characterize it as that.

Senator BRADLEY. It is the Federal standard, okay.

Could you explain what article 8.3 of the agreement means where it says water rights on the Blackfoot River will be administered "as water rights on the Blackfoot River have been administered in the past"?

Mr. BUSHMAN. During the course of the negotiations—and the negotiations took almost about 5 years to conclude—when we got to the question of water administration on the Blackfoot River, the Blackfoot River, for those of you who are unfamiliar with the reservation, forms the northeast boundary of the reservation.

On the north side of the boundary or the river are non-Indian irrigators. On the south side of the river lies the reservation. There are two watermasters on that system. One is a Federal watermaster who operates the Fort Hall Indian irrigation project. The other is a State watermaster.

They are in contact daily with one another and have been. The water rights administered on the reservation and on the non-Indian side of the river have been administered by these two individuals or their predecessors in such a fashion that there has never ever arisen a dispute.

But we could not agree on actually how the thing was administered. So it was agreed that there would become a joint administration, and in that regard we have agreed to prepare a methodology by which computations of water diversions and consumptive use will be used by both of those watermasters.

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* The information requested was not provided to the committees.

But in short, it will continue to be administered the way it has been administered in the past. Again, I wish I could give you a better definition of that, but we were not able to do that over the course of 5 years.

Senator BRADLEY. Well, maybe you could—so you cannot describe how it works, but you know it works.

Mr. BUSHMAN. Yes.

Senator BRADLEY. I have heard that one before.

Maybe you could, based upon your negotiating experience, maybe you could take a crack at putting a couple of paragraphs together to describe how it works to the best of your knowledge, since you are in this room the person who knows the most about it. Okay?

Mr. BUSHMAN. I would be pleased to do that.

Senator BRADLEY. I have just a question or two for Mr. Underwood. In section 5(a) of the bill there is a sentence that says "All exemptions that result from such a repayment shall be deemed to be applicable without further qualification on the part of such contracting entity and: Provided, further, that with respect to subsequent users of this water, the reclamation laws shall apply only to the extent such laws would have applied to such subsequent users prior to the date of this act."

What does that mean?

Mr. UNDERWOOD. My understanding, Mr. Chairman, section 5 deals with a part that is always troublesome, I think, to any Indian water rights settlement in the past. Generally, it is protection of the existing uses. Generally, when you look at an Indian water rights settlement there is going to be some kind of an impact, not only on the rights and uses of others, but also on operations.

One thing that this agreement—and I congratulate those that are a party to this—does is that it addresses those. A lot of times those are not addressed and basically, you do not have a settlement because you cannot work that out.

In this particular case, what they intend to do is to take the mitigation concept of mitigation storage water, and use that to make up for the water that was displaced, the natural flows, the rightholders that were using natural flows, and the water that they will not be allowed to use because of the quantification of those rights, and use the concept of the mitigation storage water.

What they have done was they looked through the system. In this particular case, the amount of uncommitted or uncontracted storage space is only in two reservoirs, Palisades and Ririe Reservoirs. In fact with the commitment of those storage spaces here, basically you have all of the storage allocated for all of the projects.

What this language does—and I will get to your bottom line—the benefit of section 5 is that it deems that the construction costs of that storage space, that roughly 130,000 acre-feet, will be used for mitigation water for these users which are natural flow users, would be exempt from full price cost pricing and acreage limitations in the Reclamation Reform Act.

Again, these people are basically natural rightholders. They were not necessarily subject to reclamation reform provisions previously. So by using a part of the mitigation water, then this was intended to, by virtue of using that water, not to be subject to Reclamation Reform Act limitations.

My understanding is that any other limitations within the Reclamation Reform Act are presumed to apply. It is just that these provisions here would not be. In other words, you would not have a party who potentially was using some other kind of a right and now subject to the Reclamation Reform Act limitations because he was using the mitigation storage. That is my understanding of the section and the intent of the overall and the section, that part that you made reference to.

Senator BRADLEY. So that a party would not be subject to the acreage limitation under the Reclamation Reform Act?

Mr. UNDERWOOD. Correct, because they would assume that the project—one thing to keep in mind is that Ririe is a Corps project and not subject to Reclamation previously, and that is the vast majority of the storage you are talking about.

Senator BRADLEY. In other words, it would not have been covered anyway?

Mr. UNDERWOOD. That is right.

Excuse me. Let me add one point. And it also would apply because you are contracting with an entity, then there may be an assignment. So that this is clarification that that exemption would also apply to the assignees.

Senator BRADLEY. What about the water conservation requirement?

Mr. UNDERWOOD. It would presume that that would apply. It does not specifically say here, but that would presume that all other parts of the Reclamation Reform Act would apply.

Senator BRADLEY. In section 213, what are the exemptions?

Mr. UNDERWOOD. Pardon me?

Senator BRADLEY. In section 213.

Mr. UNDERWOOD. Of the Reclamation Reform Act?

Senator BRADLEY. What are the exemptions referred to?

Mr. UNDERWOOD. Basically, what this has to do with is when the project has been fully repaid. In other words, when your obligations have been fully repaid then you are no longer subject to those limitations.

Senator BRADLEY. So the exemptions are in section 213?

Mr. UNDERWOOD. Correct.

Senator BRADLEY. I have no further questions.

Senator INOUYE. I would at this juncture request that the Justice Department counsel whom I see in back, Mr. Monson——

Senator BRADLEY. Yes, would Mr. Monson please take the microphone.

Mr. Monson, you did participate in the negotiations, did you not?

Mr. MONSON. Yes, I did, Mr. Chairman.

Senator INOUYE. Assuming that this measure passes as is and all parties ratify the agreement, what would be the schedule from then on? What do you anticipate would be the schedule?

Mr. MONSON. Mr. Chairman, at this time I am not authorized to speak for the Department of Justice, but I will be pleased to present an answer to that question for the record.*

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* The information requested was not provided to the committees.

Senator INOUYE. You cannot tell us what you propose to do? Are you not going to court to have a final decree?

Mr. MONSON. Yes, there will be a final decree or partial final decree for the settlement agreement in this case.

Senator INOUYE. When would that come about?

Mr. MONSON. Once all of the provisions in article 18 regarding the effectiveness of the agreement have been completed—I guess that is one of the provisions. Essentially, once Congress approves the agreement, if it does, and it requires the approval of the Idaho legislature and the approval of the Shoshone-Bannock Tribes.

Senator INOUYE. Then section 7(e) comes into effect?

Mr. MONSON. Section (e) of the legislation?

Senator INOUYE. Yes.

Mr. MONSON. Once Congress passes that, yes.

Senator INOUYE. So even if Congress fails to appropriate, there is not much the Tribes can do about it?

Mr. MONSON. The only provision in the agreement that provides some incentive for Congress to appropriate the money concerns the Tribe's waiver of its claims against the United States. The Tribe has indicated that it may have some claims against the United States regarding the inundation of lands and waters by construction and enlargement of American Falls Reservoir, and those claims are not waived unless and until Congress has appropriated the money.

But as far as the Tribe's claims to the water rights are concerned, those would be final once they are decreed by the district court.

Senator INOUYE. Is there any provision in the agreement or the bill that would authorize the Tribe to sue?

Mr. MONSON. To sue whom?

Senator INOUYE. The United States or the Congress.

Mr. MONSON. There is nothing in the agreement or the bill which precludes such a suit, but there is nothing in there which specifically authorizes one, either.

Senator INOUYE. Can the judicial branch force the Congress to appropriate money?

Mr. MONSON. I would think that would create a separation of powers problem, particularly when we are dealing with a State court here.

Senator INOUYE. So from that standpoint protection is not available. I am citing the worst case situation.

Senator MCCLURE. Mr. Chairman, could I ask?

Senator INOUYE. I would hope that the United States would behave much more responsibly, but in case it does not.

Senator BRADLEY. Let Mr. Monson——

Senator MCCLURE. Mr. Chairman.

Senator BRADLEY. Let Mr. Monson answer.

Mr. MONSON. I am going to have to think about that question, Mr. Chairman, and perhaps we could try to respond to that for the record.*

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* The information requested was not supplied to the committees.

Senator BRADLEY. Senator McClure.

Senator MCCLURE. Mr. Chairman, there are general provisions of the law that, if the United States Government fails to complete its required actions under contract, that another party to that contract can bring a suit against the Federal Government to collect under the contract.

We have in the budget a claims and judgments section, both under the Budget Act and in the budget itself, and if there is a claim brought against the Government and the Court of Claims or the Federal courts find a judgment against the United States there is a settlement fund, which is a way, one way, of making sure that the Federal Government does meet its obligations.

Is that not correct?

Mr. MONSON. There is such a fund, yes.

Senator MCCLURE. There are general procedures, general processes of law for filing a claim against the Government for a breach of contract?

Mr. MONSON. That is correct, under the Tucker Act and some other statutes.

Senator MCCLURE. And even though Congress does not make the appropriation specifically for that purpose, if there is a contract award it comes out of the claims and judgments fund, is that correct?

Mr. MONSON. I believe so, Your Honor.

Senator MCCLURE. Thank you.

Mr. MONSON. Mr. Chairman——

Senator BRADLEY. Let me just say that I think that it is unnecessary to refer to a Senator as "Your Honor."

Senator MCCLURE. And very unusual.

[Laughter.]

Mr. MONSON. Force of habit, Mr. Chairman.

Senator BRADLEY. I believe that, based upon what have been the expressions both on the part of Senator McClure and Senator Inouye and some of the people at the table, everyone has made it clear that there is no intention in this bill to leave the Tribe, having given up its rights, without any of the dollars or any right to go after the money that had been promised to the Tribe pursuant to the agreement.

What we need to do is not operate on that point in the atmosphere of ambiguity, but be very clear about it. As Senator Inouye had asked, maybe you have some ways or suggestions that you could make that might improve this bill, so that when someone looks at the bill they do not draw the conclusion that no one here wants.

Senator INOUYE. Let me make an observation, Mr. Chairman. I would just like to respectfully make this observation. Assuming what the counsel of the Justice Department says is correct, we would have a situation that, upon the passage of this measure, all parties would receive their benefits from the bill with the exception of the Indian Tribe, and if the Indian Tribe finds that the United States Government or other parties are not forthcoming with their promises, then they can sue.

So you will find in one case no one has to go to court to sue, they automatically get it on day one, but the Indians may have to spend

a lot of money and time and sue and not know what the outcome will be.

That is why I am hoping that the negotiators can in the next few hours come up with something that we as trustees can assure the Indians that their rights and claims are adequately and appropriately protected and that all parties will come forth with what I can was the intention of this measure. I do not think that the authors intended to see that the Indians get a short deal. I think everyone intended that everyone has a fair deal.

But having served in the Congress now for 30 years, I know that there are times, no matter what the intentions are, we do not carry out our intentions. There are many tribes that are still waiting for moneys to be appropriated, for promises that were made decades ago, and I do not want them to be waiting.

Senator BRADLEY. I think you made a good point, Senator Inouye. Let us hope that those who have worked this for a long time can answer.

Senator MCCLURE. Mr. Chairman, may I just, because I do not want to leave the record in quite the posture in which it is now. It is not quite that one-sided, even under the way they have stated it here, because there are a lot of different provisions under this agreement that someone might have to go to court to enforce.

There are a lot of actions to be taken, a lot of things to be done, and a lot of opportunities for people on all sides of this agreement to fail to carry out the agreement. So there may be the necessity, certainly there is the opportunity, for any party who is aggrieved by the failure of others to live up to the provisions of the agreement to go to court to enforce the terms of the agreement. That is equal on all parts.

I certainly agree with the Chairman of the Select Committee when he says we should not leave the Indians in the posture of having to sue to get the compensation for which they relinquished rights, and I do not want them to be in that position. I hope Congress never puts them in that position.

But I would much rather that they had the right to sue than for the record to be on the basis that, sorry, if Congress does not appropriate the money you are just out of luck. I do not read the agreement that way. I do not read the legislation that way.

I hope that before we are through that it will be very clear that that is not the situation.

Senator BRADLEY. Thank you very much, Senator McClure.

Let me thank this panel for your time and urge you to think clearly about what has been conveyed to you from all Senators on this matter.

Mr. HAYES. Thank you, Mr. Chairman.

Senator BRADLEY. Next we have now a panel that will include: Mr. Clive Strong, Deputy Attorney General, Natural Resources Division, Boise, Idaho; Daniel Warjack on behalf of the Shoshone-Bannock Tribes; Joe Rosholt of Nelson, Rosholt, Twin Falls, Idaho.

If all three of you could take your place. All three of you, if you could try to summarize your testimony so that we can have time for questions. Welcome to the committees, and let us begin with Mr. Strong, the Deputy Attorney General for Natural Resources.

Mr. Strong.

STATEMENT OF CLIVE J. STRONG, DEPUTY ATTORNEY GENERAL, STATE OF IDAHO AND CHIEF, NATURAL RESOURCES DIVISION

Mr. STRONG. Mr. Chairman and members of the committee, it is my pleasure to appear here today on behalf of Governor Cecil Andrus, Attorney General Jim Jones, and the Idaho Water Resource Board. I am a Deputy Attorney General for the State of Idaho and Chief of the Natural Resources Division, and as requested by the chairman I have submitted written testimony that I will allow to stand in the record and ask to be made part of the record, and will extrapolate certain portions of that and respond to some questions that were raised in the initial panel's questioning.

Senator BRADLEY. Your statement will be included in the record in full.

Mr. STRONG. Thank you, Mr. Chairman.

I think the important point that permeates this whole agreement is the process that was used in arriving at the agreement. When the State of Idaho was involved in a long, contentious controversy over the use of the water, we reached an agreement with the power company that included a provision that we do a general adjudication of the Snake River Basin for purposes of quantifying all water rights within that basin so that we would be in a better position to effectively manage the resources of Idaho.

But before beginning that process of the general adjudication, the State, with some foresight, went to the surrounding States and specifically spoke with them in terms of their experience and their attempts to quantify Federal reserved water rights and in particular Indian reserved water rights.

We examined the situation in Wyoming with regard to the Wind River adjudication. We looked at the situation in Colorado with regard to the Ute Mountain Ute Reservation. And we also looked into the State of Montana and the controversies that have existed there in terms of negotiating resolutions with the tribes.

It is from those experiences that we devised a process in joint agreement with the Tribes to have an objective of the negotiations to find a solution that affects all existing water users, while at the same time ensuring that the Tribes receive a water supply.

We also found that one of the difficulties in reaching agreements in the other States was the lack of an open process, and so we ensured that the process was open to the public. Everyone that had a comment or a concern was entitled to participate in those proceedings.

Then finally as part of the process, we realized that it was going to be incumbent upon the State and the Tribes to try to use the existing resources to the extent possible, rather than looking to the Federal Government as a bailout in terms of a new storage project.

With those objectives in mind, we began the process up front with all parties coming to the table expressing their true needs to each other and then began the process of shaping an agreement which I believe effectively fits all those various interests together in a collective way that ensures the benefits of all parties.

In the initial panel there were several questions raised that I would like to specifically address. The issue was raised as to how we intend to protect the Tribes in terms of their receipt of the con-

sideration, of the $22 million from the Federal Government in the context of this particular settlement agreement.

In order to understand how we arrived at the bill, it is important to go back and to understand the parameters under which we were operating. Initially when we got into the cost-sharing question, the issue was raised by the OMB that they did not want to appropriate all the moneys up front for the Tribes. Instead, they wanted to spread those payments over a period of years.

That obviously caused concerns for the water users of the State in terms of having those appropriations be an obstacle to the full implementation of the agreement and the final quantification of the water rights. So what the agreement provides is that the Tribes and the United States would not be able to set aside the agreement for the failure of the United States to appropriate the funds. Instead, once the authorization comes into place then the agreement becomes effective.

We did not leave the Tribes out in the cold on that issue, however. We recognized that the Tribes were entitled to the benefit of their bargain, which was the $22 million from the Federal Government. So specifically in the legislation we inserted a provision that provides that the waiver of claims against the United States will not become effective until such time as all funds that are required under the agreement from the Federal Government are appropriated and paid to the Tribes.

It was our intent to make that a specific consideration issue, that it would be based upon contract, and that it would be subject to enforcement through the claims judgment provisions.

Now, there are certainly other ways that that can be accomplished, but we did provide a mechanism for assuring the protection of the Tribes and the benefit of their bargain.

Another issue was raised with respect to the administration provisions of the Blackfoot River. Again, it is important to go back and examine the history of the negotiations to determine the exact meaning of that provision. Initially the concern existed between the State and the Tribes in terms of the administration of the Blackfoot River because that is a mixed water supply in the Snake River Basin. You will see in my testimony a map that, if you need to look at the hydrological features to understand things, will help you understand my testimony.

Waters from the Snake River are diverted through what is called the Reservation Canal. The Reservation Canal then empties those waters into the Blackfoot River. On the course of the Reservation Canal there is Sand Creek, which empties into the Reservation Canal, and mixes water supplies from Sand Creek and from the Snake River and those then are mixed with the Blackfoot waters which are regulated by the equalizing reservoir.

It was our concern that, because of those mixed water supplies, that there needed to be a single watermaster for the river system, and we were able to negotiate or fashion a solution in the Snake River in terms of a specific understanding of how that administration would occur. On the Blackfoot, however, it was much more difficult, because the State had had the perception and continues to have the perception that it has administered those water rights in the past. The Tribes, on the other hand, had perceived that they

administered the water supplies and were unwilling to cede that authority.

So after a course of a long discussion on those particular issues, we came to the realization that if we looked at the current administration provisions that they had worked effectively for the past 100 years and, rather than try to spell out those particular concerns, that we would go forward with that administration.

Now, what is that administration? At least the State's understanding of that administration is that the United States, through the Fort Hall Indian project, has historically managed the storage waters of the Blackfoot and Grays Lake and has delivered those waters as necessary to meet the needs of the Tribes on the reservation.

The State, on the other hand, has had a Blackfoot River watermaster who has been responsible for ensuring that the natural flows are delivered to the non-Indian water users on that system. As the United States explained, both the Blackfoot watermaster and the director of the Fort Hall Indian irrigation project work on a daily basis in communication with one another to ensure that storage and the natural flow water rights are effectively delivered to the various water users in that basin.

They do that through a mechanism of calculating the natural flow, and in order to ensure that the parties have a full understanding of how that operation will occur in the future the plan specifically calls for a Blackfoot management plan which will spell out in writing the procedures that we have used in the past to allocate the storage and the natural flow water supplies.

Another issue that was raised was the definition of beneficial use. In the context of the agreement, the word "beneficial use" is used for the purposes of transfers of water rights, Tribes water rights, within the exterior boundaries of the reservation.

One of the difficulties in terms of settling this particular case was a concern from the Tribes about imposition of State law procedures, and under a Federal reserved water right it was the understanding of the parties that the Tribes could freely use their water within the reservation. The concern, however, from the State's perspective was that unless there was some limitation imposed on the Tribes that it could lead to a controversy if the Tribes just merely diverted the water without having a specific use in mind, instead trying to reduce the water supplies in the river without putting the water to beneficial use.

So in order to alleviate the State's concern about injury of other water rights users, what we did is we specifically spelled out that the Tribes have the right, as we recognize under the Winters doctrine, to freely transfer their water rights for uses within the reservation, but that the Tribes have agreed that those water rights will as they are exercised be used for some useful purpose that the Tribe identifies, and that will be identified through the agreement.

Finally, the question was raised as to how will the agreement be implemented? The agreement will be implemented by Congressional ratification of the agreement, followed then by the State legislature approving the agreement, and then finally by the general membership of the Shoshone-Bannock Tribes acting upon the agreement.

Once those next two steps occur, then the agreement will be submitted to the district court as a proposed consent decree. As a consent decree, parties will have an opportunity to object to the decree. If the decree is finally accepted by the court, then it will become final and the agreement will become effective.

The other issue that was raised by Senator Bradley was the use of the storage water and its implications on the Reclamation Reform Act. The reason that we have specifically included a provision in the bill with regard to the Reclamation Reform Act is because mitigation water will be used, not by an individual water user, but instead by the contracting entity.

The contracting entity will release the water into the river when the Tribes exercise the water right, and that exercise of the water right results in a reduction of the natural flow. The objective will be to augment the river up to what was traditionally the natural flow without the exercise of the tribal water right, and that water will then just be diverted by the natural users on a general basis.

So the idea would be that a natural water user who happens to be receiving some of the storage water should not become subject to the Reclamation Reform Act merely because he is receiving that mitigation water.

Senator BRADLEY. Mr. Strong, do you want to conclude?

Mr. STRONG. Certainly, Your Honor. Excuse me. "Your Honor." We are all lawyers here, I guess, and we are used to going to court.

Thank you, Mr. Chairman.

In conclusion, I guess the point I would like to make is that as we have gone forward in this process it has been a consensus building process and we will continue to use that process, because it is only through consensus that we can effectively reach an agreement that will work to the benefit of all parties.

Thank you.

[The prepared statement of Mr. Strong follows:]

PREPARED STATEMENT OF CLIVE J. STRONG, DEPUTY ATTORNEY GENERAL, STATE OF IDAHO AND CHIEF, NATURAL RESOURCES DIVISION

Mr. Chairman and members of the Subcommittee, I am Clive Strong, Deputy Attorney General, Chief of the Idaho Attorney General's Natural Resources Division. I am testifying on behalf of the Governor, the Attorney General, and the Idaho water Resource Board in support of S. 2870, a bill to approve "The 1990 Fort Hall Indian water Rights Agreement."

The 1990 Fort Hall Indian Water Rights Agreement, when implemented, will quantify all existing claims for present and future water use of the Shoshone-Bannock Tribes, its members and its allottees in the Upper Snake River basin. As shown on Attachment 1, the Upper Snake River basin includes all of the Snake River water system, surface and groundwater, upstream from the Hells Canyon dam, the lower of three Idaho Power Co. dams authorized by FERC project License No. 1971. Attachment 1 also shows the important hydrologic features on or near the Fort Hall Indian Reservation.

The 1990 Fort Hall Indian Water Rights Agreement is unique. Rather than being a product of litigation, the Agreement is the result of five years of government to government negotiations, which began before the initiation of the Snake River basin general stream adjudication. These negotiations were initiated out of the desire of the Shoshone-Bannock Tribes and the State of Idaho to work as neighbors rather than as adversaries.

The waters of the Upper Snake River provide the water supply for the arid desert of southern Idaho. The waters of the river are used to satisfy the irrigation, industrial, commercial, municipal and domestic needs of the citizens of Idaho. The river is also the principal source of energy for the region. In addition, the waters of the

Snake River are relied upon for recreation, fishing and other instream uses. In short, the waters of the upper Snake River basin are the lifeblood of southern Idaho.

If the Tribal water rights had been quantified through litigation, existing water uses might have been displaced. The parties recognized that displacement of these existing uses would be detrimental to everyone; thus, the parties adopted at the outset of the negotiation a mutual goal of fashioning an Agreement that would protect all existing uses while providing the Tribes with a wet water supply.

The parties also recognized that their goal was only achievable if all affected parties had a full opportunity to participate in the negotiations. Thus, it was agreed that all negotiation sessions would be open to the public and everyone would be given an opportunity to be heard. While this approach lengthened the negotiation process, it was a key to reaching the consensus required for an agreement.

Another key ingredient to the settlement was the willingness of the parties to accept the reality that development of a new water supply to satisfy the Tribal water needs was not a viable option under current conditions. Instead, the parties examined existing resources and uses and then began the process of crafting an agreement that would fit these pieces together. The result of the negotiations is an agreement that is very much like a jigsaw puzzle. No single piece of the puzzle can fit together with the other pieces in any other way and still achieve the goal of protecting existing uses while ensuring the Tribes a sufficient water supply to meet their present and future needs in the Upper Snake River basin.

Under the Agreement, the Tribes, Tribal members and Tribal allottees will receive 581,031 afy of water from the Snake River basin each year as full satisfaction of all existing water right claims for present and future uses of the Tribes, Tribal members and Tribal allottees in the Upper Snake River basin. The water supply for the Tribal water rights is a combination of natural flow, groundwater and federal contract storage water. The parties employed several innovative solutions to satisfy the Tribes' desire to have as many of their water rights as possible recognized as *Winters* water rights, while at the same time protecting existing water users.

In the Blackfoot River basin, the United States holds storage water rights in the Blackfoot Reservoir and Grays Lake for the Tribes and certain non-Indian Fort Hall Indian Project water users. These storage water rights acquired under state law pursuant to the 1907 Fort Hall Indian Irrigation Project Act are junior to most of the water rights of non-Indian water users within the basin. Recognition of a *Winters* natural flow water right for the Tribes in lieu of these storage rights would have injured the non-Indian water users because their water rights are to natural flow as well. Thus, to avoid this consequence, the parties agreed to a 150,000 afy *Winters* water right from the Blackfoot River; however, this right will be satisfied in times when the natural flow of the Blackfoot River is insufficient to meet both the Tribal and non-Indian water rights by using the existing storage water rights held for the Reservation. The practical result is that the Tribes have a reliable water supply because the storage water in Blackfoot Reservoir and Grays Lake is more than sufficient to fill the *Winters* entitlement in times of shortage and the non-Indians will continue to receive their historical entitlement to the natural flow of the Blackfoot River.

The Tribes claimed all waters in the Bannock Creek basin. Recognition of a *Winters* right in this basin would have displaced the existing non-Indian water users upstream from the Reservation and would have been inconsistent with the Tribal rights decreed in the 1907 Bannock Creek decree. In order to avoid both of these problems and yet meet the Tribes' objective, the parties agreed to recognize a *Winters* water right for the Tribes to all remaining waters in the Bannock Creek basin, but provided that the Bannock Creek decree would govern the distribution of all existing surface water rights in the basin. New Tribal surface water rights not quantified by the Bannock Creek decree will be delivered after the Bannock Creek decreed water rights. The Tribes also agreed to exercise their groundwater rights in a manner that ensures non-Indians diverting groundwater will continue to receive their full legal entitlement.

Perhaps the most innovative solution was the one developed for the Snake River. The Tribes desired to substitute a 115,000 afy *Winters* water right for their portion of the state-created Snake River water right for the Fort Hall Indian Irrigation Project. The Tribes' claim from the Snake River could not be satisfied without impacting some existing non-Indian Snake River water users. Instead of walking from the table over this point, all parties agreed to shoulder part of the burden resulting from the recognition of the Tribal water right. The Tribes agreed to phase in over time 15,000 afy of the 115,000 afy Snake River Tribal water right for new development to provide time for the water users to find a means for mitigating the impacts arising from the exercise of the right. The Tribes also agreed to continue their exist-

ing practice of taking Sand Creek return flow that empties into the Reservation canal.

One difficulty with the use of Sand Creek water is its widely varying flows. Initially, the United States considered rehabilitating the Equalizing Reservoir to regulate the flows of Sand Creek. This would have cost upwards of $15 million. Based upon some creative thinking, however, the parties determined that an exchange of storage water held by the Northside Canal Company in Palisades Reservoir for Sand Creek flows that could not be regulated by the Equalizing Reservoir as it now exists would alleviate the need for the United States to rehabilitate the Equalizing Reservoir. In return, the United States agreed to make available to the private water users, at no cost except for payment of annual operation and maintenance costs, 18,900 afy of Palisades storage space and 80,500 afy of Ririe storage space. This space is expected to yield about 40,000 afy, which will be used to offset some of the impacts that will be felt by the non-Indian Snake River water users. The balance of the impact resulting from the recognition of the Tribal water right from the Snake River will be mitigated by the non-Indian water users.

Finally, to protect the non-Indian Fort Hall Project water users, the Agreement is contingent upon the quantification of that portion of the existing Snake River Fort Hall Indian Project water right necessary to satisfy their contract entitlements. The United States will ensure that the non-Indian Fort Hall Project water users' legal entitlement is met from the Snake River water right quantified for the non-Indian project water users and the 22,000 afy of storage from Blackfoot Reservoir set aside for these water users.

All natural flow water and groundwater quantified for the Tribes is for use only within the boundaries of the Fort Hall Indian Reservation. The Tribes, however, may lease or transfer the Tribal water rights within the Reservation, provided the lease or transfer does not increase the annual volume of consumptive use or exceed any other elements of the Tribal water right. These conditions are in recognition of the fact that downstream water users rely on the return flow from the Tribes' water use to fill their water rights.

The Tribes desired a mechanism to realize the value of their federal contract storage water from the Palisades and American Falls Reservoirs. Thus, the Agreement recognizes that the Tribes may rent storage water accruing to this storage space under provisions of state law, subject to several protections set forth in the Agreement.

The Agreement also recognizes that the Tribes may use their storage water for instream flows on river reaches on or adjacent to the Reservation. Storage water for instream flows from the Blackfoot River system, however, is limited to 15,000 afy and must be deducted from the Blackfoot water entitlement.

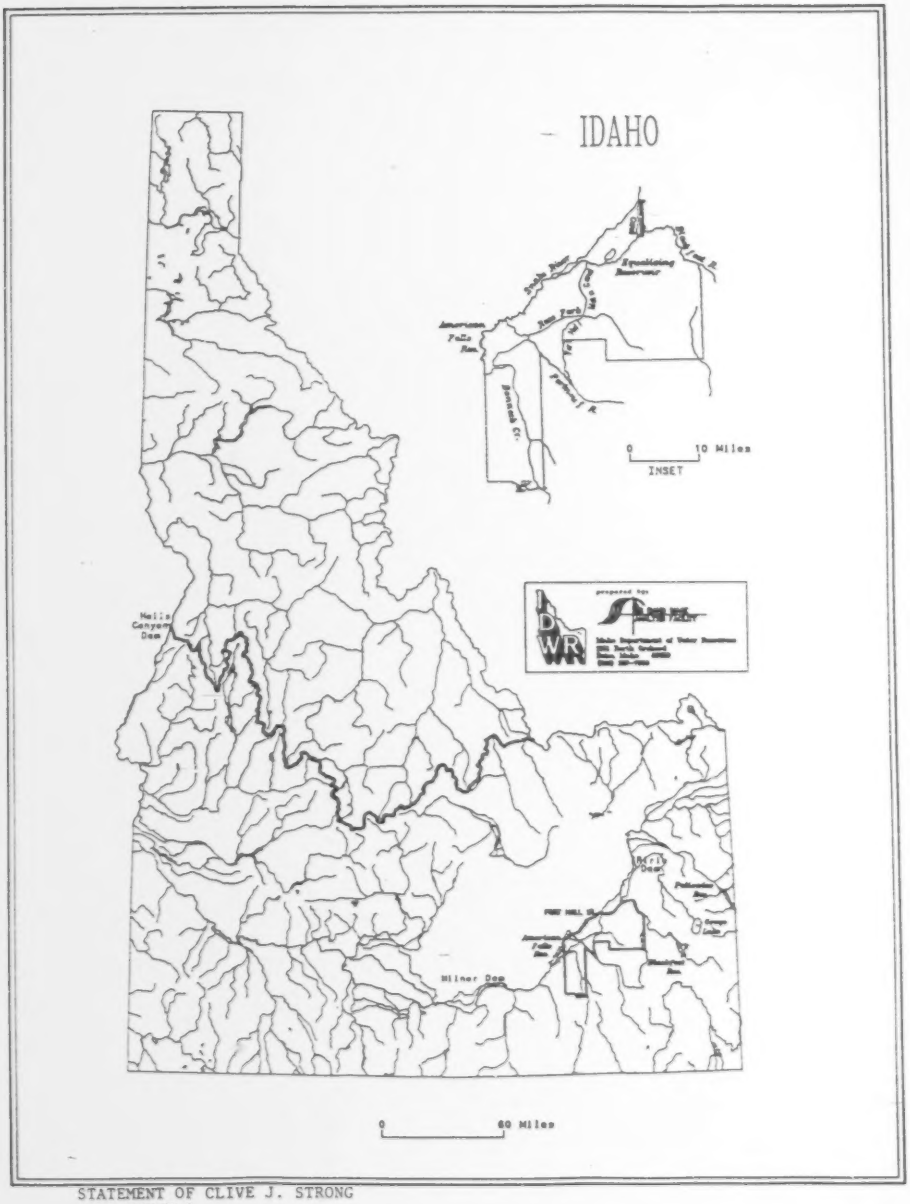
In addition to resolving the water supply problems, the Agreement provides for the administration of the water rights. The administration provisions are designed exclusively for the purposes of this Agreement, however, and do not address the administration of any other federal water rights such as the Bureau of Reclamation water rights for the federal dams on the Snake River.

Finally, as a key part of the Agreement, the Tribes are seeking $22 million from the federal government to permit them to use the water that is being made available to them. The monies requested are consistent with the United States trust responsibility to the Tribes.

Each party is shouldering a part of the cost of implementation of the Agreement. The United States will contribute existing unallocated storage space and the Tribal development monies. The Tribes will phase in a portion of their Snake River water right. The state will pay the filing fees for the adjudication of the water rights set forth in the Agreement and contribute up to $250,000 of in-kind service to the Tribes. The private water users will shoulder the burden of mitigating a portion of the impact arising from recognition of the Tribes' Snake River water right.

The Agreement also has incidental benefits for fish and wildlife. Part of the $22 million to be appropriated for the Tribes will be used to acquire land and grazing rights adjacent to Grays Lake, which will benefit the whooping crane, an endangered species, and the Tribes may rent their American Falls storage water for augmentation of downstream flows for anadromous fish.

Unlike many of the other agreements Congress has considered, this Agreement enjoys the support of the federal administration. The Department of Justice, the Department of the Interior, and the Office of Management and Budget, as well as the Tribes, the State, and the private water users who participated in the negotiations have all endorsed the Agreement. If nothing else, the fact that all of these parties support the Agreement demonstrates that it is fair and equitable to all parties. Thus, we respectfully request that you ratify the Agreement as provided for in S. 2870.



STATEMENT OF CLIVE J. STRONG
ATTACHMENT 1

[ATTACHMENT 2]

SECTION-BY-SECTION ANALYSIS OF S. 2870

Section 2. Definitions

This section contains those definitions necessary for interpretation of the bill.

Section 3. Findings

This section states the purpose of the bill, which is to resolve all existing water right claims for present and future use of the Shoshone-Bannock Tribes, Tribal members and Tribal allottees in that portion of the Snake River basin above the Hells Canyon dam.

Section 4. Ratification of Agreement

This section ratifies the Agreement to the extent congressional ratification is required. Further, it authorizes and directs the Secretary to implement the Agreement.

Section 5. Protection of Existing Uses

Subsection (a) authorizes and directs the Secretary to contract with the Idaho Water Resource Board or another entity acceptable to the Committee of Nine for 18,900 acre feet of storage space in the Palisades Reservoir and 80,500 acre feet of storage space in the Ririe Reservoir and waives the obligation of the contracting entity to pay construction costs chargeable to the space. The contracting entity will be required, however, to pay annual operation and maintenance charges. Finally, subsection (a) provides that the Reclamation laws will not apply to the contracting entity and will apply to subsequent users of the storage water only if such laws applied to the subsequent user because of other contracts with the Bureau of Reclamation.

Subsection (b) provides that the Agreement can not be set aside because of the failure of a party to file a timely application to contract for the storage space. The State or the private water users can set aside the Agreement, however, if the Secretary fails to convey the storage space without cost, except for payment of annual operation and maintenance charges, to the contracting entity after the filing of a timely application.

Section 6. Use, Transfer, and Lease of Tribal Water Rights

Subsection (a) recognizes the right of the Tribes to lease and transfer their water rights within the Fort Hall Indian Reservation. Subsection (b) recognizes the Tribes' right to rent, pursuant to state law, the federal storage space held in trust for the Tribes under the Michaud Act. Subsection (c) recognizes the Tribes' use of certain storage space for instream flows on or adjacent to the reservation. Subsections (d) and (e) provide congressional authorization for the uses described in subsections (a), (b), and (c). Each of these uses must be in accordance with the terms and conditions of the Agreement.

Subsection (f) provides that the use of the water by the Tribes for rental or leasing shall not be subject to any limitation on price or subject to any state or federal taxation. Subsection (g) provides that the use of the water for any purposes set forth in section 6 shall not result in a forfeiture or abandonment of the underlying storage contract. Finally, subsection (h) provides that except for the specific storage water uses authorized in this section, all Tribal water rights and water accruing to tribal storage contract space must be used exclusively on the Fort Hall Indian Reservation.

Section 7. Contribution to Settlement

Subsections (a), (b), and (c) provide that the United States will authorize and appropriate over time $10 million for a Tribal development fund, $7 million for development of a Reservation water management system and $5 million for the acquisition of grazing rights and lands adjacent to Grays Lake. Subsection (d) prohibits the use of appropriated funds for per capita payments.

Subsection (e) provides that authorization of these funds described in subsections (a), (b), and (c) is a contingency of the effectiveness of the Agreement; however, neither the Tribes nor the United States may set aside the final decree if the funds are not appropriated. Finally, subsection (f) disclaims any intent to limit the trust responsibility of the United States to the Tribes.

Section 8. Waiver of Claims

Subsection (a) waives all existing water right claims for present and future use of the Tribes, Tribal members and Tribal allottees from the Upper Snake River basin

as well as for the Bureau of Indian Affairs for the Fort Hall Indian Irrigation Project and for all of the Bureau's facilities associated with the Fort Hall Indian Agency. The only exceptions to this disclaimer are for members' water right claims pursuant to state law for non-Indian lands outside the exterior boundaries of the Fort Hall Indian Reservation, for claims of federal agencies other than the Bureau of Indian Affairs, Fort Hall Indian Agency and for other Indian Tribes. As provided in the Agreement, the Tribes reserve the right to make claims for instream flows in the Salmon River basin and in the Snake River below Hells Canyon dam; however, no claims, if ultimately recognized, may require the release of water from the Upper Snake River basin.

Subsection (b) provides that the United States will receive a waiver of all existing Tribal claims against the federal government arising in whole or in part from or concerning water rights finally settled by the Agreement and for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir when the United States completes all of its obligations under the Agreement and this Act, including but not limited to the appropriations and payment of the funds required by section 7 of this Act.

Subsection (c) waives the claims, if any, that the United States or the Tribes have against the State or any water users within the Snake River basin for lands or water that have been inundated by the past construction or enlargement of American Falls Reservoir.

Section 9. Individual Members and Allottees of the Tribes

This section is intended as the counterpart of the waiver of Tribal claims set forth in section 8(a). If a Tribal member or allottee is awarded a water right for any Indian lands in the Upper snake River basin, then this section gives congressional authorization for a corresponding reduction in the Tribal water rights set forth in the Agreement.

Section 10. Effective Data

Subsection (a) provides that this Act shall be of no force and effect unless the Agreement becomes effective according to its terms. Subsection (b) provides that no monies authorized by section 7 shall be disbursed until the Agreement becomes effective.

Section 11. Disclaimers

Subsection (a) recognizes that this Act does not quantify the water right claims of the City of Pocatello or any other Indian tribes. Subsection (b) provides that nothing in this Act shall be construed to waive any water right claims of the Tribe or the United States except as provided in the Agreement. Subsection (c) is a general reservation of any rights not covered by the Agreement or this Act. Finally, subsection (d) provides that no existing laws are superseded except to the extent specifically provided by this Act.

Section 12. Protection of Tribal Water Rights

This section provides that the Tribal water rights set forth in the Agreement shall not be taken from the Tribes without their consent and payment of just compensation.

Senator BRADLEY. Mr. Warjack, welcome to the subcommittee.

STATEMENT OF DANIEL WARJACK, ON BEHALF OF THE SHOSHONE-BANNOCK TRIBES, ACCOMPANIED BY HOWARD FUNKE, TRIBAL ATTORNEY

Mr. WARJACK. Congressmen, Senator, the Shoshone-Bannock Tribes appreciate the opportunity to appear before your committee to voice concern and support for this water agreement. We come from Fort Hall yesterday and there is four of us that come to this hearing. There is myself and Mary Washakie and Marvin Osborn and Gilbert Keeton.

We also have our legal staff from Fort Hall. We have Howard Funke, Charles Pace, and Dale Martin, the Administrative Assistant. We all work in the same building at Fort Hall Agency tribal office.

As you well know, the majority of our people in the State of Idaho were forced to live on the Fort Hall Indian Reservation. It was made big enough so it will hold all the Shoshone and Bannock Nation in one place, and in doing so we lost most of our claims that we designated for our home.

This treaty that was made was made July 3, 1868, with the Eastern Band Shoshone and the Bannock Tribe from Idaho. At Fort Hall there are some members of both tribes. We have an acreage of 554,000 acres on this reservation, and this is part of the millions of acres that we had in the past and it is a recognized territory known by other tribes in the area. This area also covers the Boise and Weiser and part of the claim adjacent to the Nez Perce people.

We are here to express our concern over our water. This is more important to the people and our people rely on water, as well as for irrigation, in our ceremonials that we have. It is real important.

We take care of all our natural resources as best we can, and in this we take care of our buffalo. We have buffalo at Fort Hall and we have—I do not know whether you are aware of it, but Fort Hall and the Yellowstone area is where the salmon originated, and then they migrate downriver and they have a hard time coming back up. That is why they come up the river in Idaho.

We are here today to express our concern over our water that we have there. Water is precious to us. I farm and I raise cattle out there, and it is an opportunity for a man to go out and irrigate your pasture and hay and grain and whatever and to walk out in the fields to smell the oxygen that is given off by the water, the water that is available to us.

We hope that we can come to an agreement on this water. We had a council meeting in Fort Hall and we endorsed this agreement through the Tribal Council, and we are here because we feel that it is important for us to protect our water. We feel that we are appealing before your committee to be treated fairly in the amount of limited water that is available there.

The Indians believe that water belongs to everybody. But the way it is now, there is people that is wanting water for other purposes, to generate electricity and things of that nature, and the thing that is occurring at Fort Hall that is affecting our Tribe is the building of all those dams between Idaho Falls and American Falls.

They are thinking of putting in some more power, power plants, in that area, and we need to come up with some other method of generating electricity, I think, other than relying on the hydroelectric, the water.

That concludes my portion of my testimony, and I think in conclusion Ms. Washakie would want to present her testimony after Mr. Funke, our legal counsel, after they give their presentation. At this time, gentlemen, I would like to call on Mr. Funke, our legal counsel.

[The prepared statement of Mr. Warjack follows:]

TESTIMONY OF THE SHOSHONE-BANNOCK TRIBES

BEFORE THE

UNITED STATES SENATE

SELECT COMMITTEE ON INDIAN AFFAIRS

AND

COMMITTEE ON ENERGY AND NATURAL RESOURCES

SUBCOMMITTEE ON WATER AND POWER

SEPTEMBER 13, 1990

INTRODUCTION

The Shoshone-Bannock Tribes (Tribes) of the Fort Hall Indian Reservation (Reservation), Idaho, deeply appreciate this opportunity to present our views to the United States Congress in its consideration of S. 2870 ratifying the 1990 Fort Hall Indian Water Rights Agreement (Agreement). The Agreement was executed on July 5, 1990 after five years of intense, good-faith negotiations by representatives of tribal, state, federal executive, private and public interests. Congressional approval of the Agreement is the next stage in an orderly process which the parties to the negotiations have established to determine the nature and extent of all water rights in the Snake River Basin and tributaries within Idaho.

The Legislature of the State of Idaho and the general membership of the Shoshone-Bannock Tribes will soon consider the Agreement and must give their approval before it has any force. Following congressional, tribal and state approval, the tribal and federal water rights in the Agreement will be submitted to the Fifth Judicial District Court of the State of Idaho in and for the county of Twin Falls. Upon entry of a final decree by that district court embodying the tribal and federal water rights in the Agreement, a workable resolution of conflicts over water rights in the upper Snake River basin will be within reach.

Water is a precious natural resource which provides for and sustains all life. Water resources must be managed responsibly over time. Tribal, federal and state governments cannot afford to squander time, money or other scarce resources engaging in divisive litigation which creates rather than solves problems. The five years of intense efforts to bring stability and certainty to the allocation of water resources in the upper Snake River basin without resorting to litigation has provided the parties with a cost-effective means of resolving disputes without wasting time and money or escalating conflicts between Indians and non-Indian people.

During the five years of intense negotiations, the parties developed a mutual trust and common understanding of the respective concerns and constraints that had to be squarely addressed to achieve a workable compromise. In many respects, the result is a model Agreement. It is a example of what representatives of the Tribes, the State, the federal executive branch, and irrigators who were party to the negotiations can accomplish if they are truly committed to working together to resolve conflicts in an open, innovative and creative manner.

The discussions were not always amicable and the compromises and balancing of interests inherent in the Agreement were achieved with great difficulty. In fact, there were a number of times when negotiators felt that the

efforts to reach agreement would fail and a "shoot-out" such as occurred in Wyoming over reserved water rights in the Wind River basin was inevitable. However, as the negotiation process evolved, the parties' commitment to concensus building created a fair compromise consonant with respect for the legal rights and practical needs of all concerned.

We call this the "Snake River model" and we believe that it illustrates the fundamental prerequisites for a successful resolution of conflicts over water. The negotiations were open to the public and nothing was hidden or placed off-limits in the discussions. The State's negotiators embraced good-faith, government-to-government negotiation and worked diligently to address tribal, federal and private concerns. Idaho water users were afforded full party status and invited to represent their own interests.

Tribal negotiators represented tribal interests. The Tribes---with assistance and support provided by the United States---hired their own consultants and conducted their own technical studies. Throughout the negotiations, tribal representatives worked to quantify and determine the nature and extent of the Tribes' water rights in a way that minimized the impacts on other water users. Representatives of the United States, in addition to the trust responsibilities owed the Tribes, negotiated on behalf of federal interests and investments.

As a result, the Agreement is a balanced compromise which recognizes and respects the authorities of the separate sovereigns, the responsibilities which accompany the exercise of such sovereign powers, and the hydrologic and economic inter-relationships of water use within the upper Snake River basin. We respectfully urge your careful consideration of and full support for the delicate and complex balance achieved in the Agreement.

I. HISTORICAL/LEGAL BACKGROUND

Resolution of Indians' claims to reserved water rights, like treaty-based claims to any scarce natural resource, must be grounded in a careful examination of relevant history and legal precedents.[1] We overview here some pertinent background underlying the Fort Bridger Treaty of July 3, 1868 (1868 Treaty),[2] the history of the Fort Hall Indian Reservation, and legal decisions affecting the Shoshone-Bannock Tribes.

A. PRE-1868 TREATY

Prior to 1868, ancestors of the Shoshone-Bannock Tribes occupied and used an extensive aboriginal domain which comprised "vast areas of Idaho and surrounding

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[1] See, e.g., Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979).

[2] 15 Stat 673

States," including "the Salmon River country, the Snake River country, and the length of what is now Southern Idaho."[3] Scholarly research confirms Shoshone-Bannock utilization of the Fort Hall Reservation region and southern Idaho since time immemorial. Recent archaeological research by scholars working at Idaho State University near Fort Hall confirms Shoshone and Bannock utilization of the Reservation area for at least 2,000 years, and probably ranging deeper than 12,000 years into the immemorial past.[4]

B. 1867 PEACE COMMISSION

The 1868 Fort Bridger Treaty was one of a series of treaties negotiated in 1867-68 by a federal Peace Commission established by the congressional Act of July 20, 1867 (1867

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[3]See State v. Tinno, 94 Idaho 759, 764, 497 P.2d 1386, 1391 (1972) (Tinno). Shoshone and Bannock tribesmen ranged over these large portions of present-day Idaho and surrounding states, including the area of the Fort Hall Indian Reservation, for hunting, fishing, trading and gathering pursuits. See State v. Cutler, 109 Idaho 448, 461, 708 P. 2d 853, 866 (1985) (dissenting opinion) (Tribal aboriginal territory included major portions of Idaho and all surrounding states); Shoshone Tribe v. United States, 11 Ind. Cl. Comm. 387, 404-405 (1962); B. Madsen, The Northern Shoshoni, 17-26 (Caxton Printers, Caldwell, Idaho, 1980) (hereinafter The Northern Shoshone). Before 1868 "Shoshone and Bannock Bands . . . preferred the country along the Snake River and its tributaries in southeastern Idaho" as their "home-base or area of greater attachment"). See Shoshone Tribe v. United States, supra, 11 Ind. Cl. Comm. at 404.

[4]See also The Northern Shoshoni at 17 (Introduction by Dr. M. Wells, Idaho State Historical Society) ("People have lived in the Salmon River mountains and the Snake River Plains---the traditional homeland of the Northern Shoshoni---for the past fourteen thousand years or more").

Act).[5] The congressional intentions underlying the legislation authorizing the Peace Commission are important because they clearly implicate the purposes underlying the 1868 Treaty.

There was a clear concensus in Congress that the best way to secure the benefits of peace on the frontier was to provide tribal signatories and their successors with permanent homelands for their undisturbed use and exclusive occupancy which were far-removed from rail and wagon lines to the west.[6] There was also a concensus that making war with tribes would be far too costly.7

Senator Henderson of Missouri, the Chairman of the Senate Committee on Indian Affairs and a member of the Peace Commission, introduced the authorizing bill (S. 136) leading to the 1867 Act on July 15, 1867[8] and described to the Senate the reason for enacting the legislation:

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[5]15 Stat. 17.

[6]Cong. Globe, 40th Cong., 1st Sess. 670, col. 3 (July 16, 1867) (Remarks of Senator Henderson); Id. at 679, col. 2 (July 17, 1867) (Remarks of Senator Sherman); Id. at 681, col. 2 (Remarks of Senator Pomeroy); Id. at 682, col. 1 (Remarks of Senator Howe).

7Cong. Globe, 40th Cong., 1st Sess. 680j, col. 3 (July 17, 1867) (Remarks of Senator Sherman); Id. at 681, col. 1 (same); Id. at 708, col. 1 (July 18, 1867) (remarks of Senator Morrill); Id. at 708, col. 3 (Remarks of Senator Pomeroy).

[8]Cong. Globe, 40th Cong., 1st Sess. 655, col. 3.

> It is known to us that an Indian war is now being waged. Hostilities are of daily occurrence upon the Plains.
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> * * *
>
> [U]nless these hostilities are suppressed, and suddenly suppressed, a very large expenditure will be forced upon us. Our Treasury is in no condition to meet it.... [I]f we can make peace with the Indians we had better do it.[9]

Urging that the government "stand . . . up to our own treaty obligations," he argued that any other course "will only inflict dishonor upon ourselves and accumulate our public debt."[10]

Congress understood, however, that securing peace on the frontier and the transformation of tribes would not be easy. There was no disputing the fact that the United States had violated treaty commitments in numerous instances up to that time.[11] It was also understood that those tribes which for centuries had hunted, fished, traded and gathered resources would continue those pursuits. Senator Harlan, a former Secretary of the Interior, expressed this understanding:

> We must look at these things practically . . . . [E]verybody who has looked into the subject closely knows, that the northern Indians cannot be induced to

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[9] Id. at 667, col. 3 (July 16, 1867).

[10] Id. at 669, col. 2.[10].

[11] Cong. Globe, 40th Cong., 1st Sess., 680, col. 1 (July 17, 1867) (Remarks of Senator Sherman); Id. at 681, col. 3 (Remarks of Senator Howe); Id. at 683, col. 2 (Remarks of Senator Howard).

> go down [to Oklahoma Territory]. They have lived on the buffalo, the elk, the antelope, the deer, the vegetable products of that country, and the fish of the streams for century after century, and they are as much attached to their homes as we are to ours.[12]

These views were echoed by Senator Henderson who emphasized that continuation of traditional tribal pursuits could eliminate the necessity of aid to the Indians[13] and that all treaties previously made by the United States with Indian tribes operated to recognize the Indians' pre-existing rights as the original inhabitants of the continent.[14]

Thus, Section 1 of the 1867 Act empowered the Peace Commission, composed of eminent civilian and military leaders, to negotiate with then-hostile Indian tribes in order to:

> ascertain the alleged reasons for their acts of hostility, and . . . to make and conclude . . . such treaty stipulations, subject to the action of the Senate, as may remove all just cause of complaint on their part, and at the same time establish security for person and property along the lines of railroad now being constructed to the Pacific and other thoroughfares of travel to the western Territories, and such as will most likely insure civilization for the Indians and peace and safety for the whites.[15]

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[12]Cong. Globe, 40th Cong., 1st Sess., 713, col. 1 (July 18, 1867).

[13]Id. at 703, col. 1.

[14]Id. at 668-669 (July 16, 1867).

[15]15 Stat. 17.

Section 2 of the 1867 Act directed the Peace Commission to locate areas within the western territories which

> when so selected . . . and approved by Congress, shall be and remain permanent homes for said Indians to be located thereon, and no person[s] not members of said tribes shall ever be permitted to enter thereon without the permission of the tribes interested, except officers and employees of the United States.[16]

C. 1868 FORT BRIDGER TREATY

Pursuant to the 1867 Act, the Peace Commission, negotiated with tribal leaders Washakie and Tahgee on behalf of the "eastern Band" of Shoshone and the Bannock Tribes and concluded the 1868 Treaty on July 3 at Fort Jim Bridger in Utah Territory. This treaty was ratified by the Senate on February 24, 1869 and proclaimed by President Grant on February 26, 1869.

The federal negotiator, General C.C. Augur of the Peace Commission, designated the tribal entities as the "eastern Band of Shoshonees" (led by Chief "Wash-a-kie")[17]

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[16] Id. (emphasis added).

17Washakie was well respected in Congress and throughout the West:

> [S]uch a man that if we had more like him, whether among the pale faces or Indians, we should have but very little trouble and be better off upon the frontier.

Cong. Globe, 40th Cong. 3d Sess., 803, col. 1 (February 2, 1869) (Remarks of Representative Hooper of Utah Territory). Justice Cardoza, speaking for the Supreme Court, stated:

> The loyalty of the Shoshone Tribe to the people of the United States has been conspicuous and unfaltering. A

and the "Bannack Tribe" (led by Chief "Tag-gee").[18] Tribal signatories to the 1868 Treaty were actually representative of several groups identified anthropologically as "Northern Shoshone" and "Bannocks."[19] In fact, in 1972 and based upon expert anthropological and linguistic evidence, the Idaho Supreme Court unanimously declared that the Shoshones and Bannocks represented at the treaty negotiations:

> were a rather diverse group in terms of geography and social or political allegiance. * * * [T]he various tribes or bands were in fact rather loosely knit units, and individual families freely changed their associations from one group to another; so called Shoshone Indians could and did join and live with Bannock bands and did intermarry. The two languages [Shoshone and Bannock] though different, were not substantial hurdles to social mixing.[20]

Consistent with the congressional intent underlying the 1867 Act enabling the Peace Commission, Article 1 of the 1868 Treaty provides:

> From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

This treaty guarantee is mirrored by Article 2 (purpose) of the Agreement which states that the parties "seek to secure,

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fidelity at least as constant and inflexible was owing in return.

Shoshone Tribe v. United States, 299 U.S. 4766, 486 (1937).

[18]15 Stat. 677.

[19]The Northern Shoshoni 17-26.

[20]Tinno, 94 Idaho 759, 497 P.2d 1386, 13.

and pledge their honor to maintain, peaceful settlement of conflicts over water among the parties in the Snake River Basin in Idaho."

Similarly, Article 2 of the 1868 Treaty stipulated that the Indian reservations created thereby were for the "absolute and undisturbed use and occupation" of the Indian signatories to that document. Article 4 of the 1868 Treaty secured these lands as "permanent homes[s]" for the affected tribes.[21] Tribal leaders, as well as the United States, mutually understood that the locale of the Reservation was selected for two principal reasons: (1) it was an area traditional used and occupied by the Tribes since time immemorial; and (2) it contained and was bounded by extensive natural water systems central to the common goal of promoting tribal self-sufficiency.[22]

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[21]15 Stat. 674-75. See Swim v. Bergland 696 F.2d 712, 714 (9th Cir. 1983)(Swim). In addition to the Fort Hall Reservation, Article 2 of the 1868 Treaty set aside the Wind River Indian Reservation for the Shoshones in Wyoming.

[22]In 1866, David Ballard, then Governor of Idaho Territory and ex officio Superintendent of Indian Affairs for the Territory, urged the U.S. Commissioner of Indian Affairs to establish the original Reservation site, recommending that the

> vicinity around old Fort Hall presented by far the best facilities for the location of Indian Reservation, to be found in any portion of Southern Idaho upon which to collect the various bands of Shoshone and Bannock Indians.

Letter of November 18, 1866 to D. N. Cooley, Commissioner of Indian Affairs.

The Snake River and a key tributary thereto, the Blackfoot River, formed the northern and western boundary of the Reservation for approximately 50 miles.[23] The Portneuf River, approximately 100 miles in length, as well as most of its tributaries, were contained within the Reservation as late as 1900. Since then, about 10 miles of the Portneuf River, at its headwaters and its mouth, remain within the extant Reservation, while the balance crosses substantial public lands wherein the Tribes retain priority hunting, fishing, and other use rights. Bannock Creek rises outside the Reservation but flows north through the entire southwestern segment thereof.

These water resources are hydrologically connected at a point known as the "Fort Hall Bottoms," the ancient wintering ground and heart of Shoshone-Bannock aboriginal homelands. These bottom lands which contain numerous spring-fed creeks and originally embraced about 40,000 acres of land extending along the Snake River where it formed the

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[23]The Blackfoot River comprises the northern border of the Reservation for about 33 miles. The Snake River comprises approximately 17 miles of the Reservation boundary on the north and west, including about 7 miles of the original river channel now innundated by American Falls Reservoir. Article 11.1.10 of the Agreement expressly provides:

> Nothing in this Agreement shall be so construed or interpreted ... to waive or prejudice any contention by any party ... regarding the location and extent of the Reservation's northern and western boundaries along or within the Snake River and the Blackfoot River, as well as the ownership of the beds and banks of those rivers to the ordinary high water mark.

far western boundary of the Reservation. Pursuant to federal legislation enacted in 1924, more than 28,000 acres of bottom lands were flooded to create American Falls Reservoir. More than half of this 56,000-acre reservoir remains part of the Reservation and is

> subject to the reservation of an easement to the Fort Hall Indians to use the said lands for grazing, hunting, fishing and gathering of wood, and so forth, the same way as obtained prior to this enactment, in so far as such uses shall not interfere with the use of said lands for reservoir purposes.[24]

The Supreme Court, based upon an examination of the language of the 1868 Treaty, concluded that such terms "plainly evidence[d] purpose on the part of the United States to help to create an independent permanent farming community upon the [Fort Hall] reservation."[25] The court noted that the "principal purpose of the [1868] [T]reaty was that the Shoshones should have, and permanently dwell in, the [Reservation] defined" by Article 2 of the 1868 Treaty.[26] In so holding, the court construed the pertinent Article 2 phrase---securing the reservation for the "absolute and undisturbed use and occupation" of the Shoshones---in light of the "settled policy of the United States fairly to deal with Indian tribes."[27] The court

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[24]Act of May 9, 1924, ch. 151, 43 Stat. 117.

[25]United States v. Shoshone Tribe, 304 U.S. 111, 118 (1938).

[26]Id. at 116.

[27]Id.

specifically held that the 1868 Treaty reserved to the Shoshones all minerals and timber within the original reservation boundaries despite the absence of any explicit treaty language to that effect.

In Swim v. Bergland,[28] the federal district court, relying upon both Winters v. United States[29] and United States v. Shoshone Tribe, supra, concluded that the same Article 2 of the 1868 Treaty reserved to the Shoshone-Bannock Tribes grazing rights within the original Fort Hall Indian Reservation despite the silence of the 1868 Treaty concerning such rights. On appeal, the Ninth Circuit Court in Swim affirmed the district court's finding that "the parties to the [1868] Treaty agreed and understood that the purpose of the Reservation was to enable the Tribes to transform themselves from a nomadic to an agrarian society and that grazing rights were essential to help effectuate this transformation."[30] Swim relied in this respect upon a comparable conclusion in Skeem v. United States.[31] Swim further concluded that the "objective of self-sufficiency

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[28]696 F.2d 712, 715-716 (9th Cir. 1983) (Swim).

[29]297 U.S. 564 (1908) (Winters).

[30]Id. at 716.

[31]273 F. 93, 95 (9th Cir. 1921) (Skeem).

[for the Shoshone-Bannock Tribes was] implicit in the 1868 Treaty . . . ."[32]

The decision in Skeem foreshadowed the yet-to-be announced PIA standard of Arizona I. Relying upon Winters and United States v. Winans[33] for the proposition that the 1868 Treaty reserved the Shoshone-Bannock Tribes' pre-existing rights to the Reservation, the Ninth Circuit in Skeem declared:

> The purpose of the government was to induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should be construed in the light of that purpose and such meaning should be given them as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.[34]

Article 4 of the 1868 Treaty reserved to the signatory tribes continuing rights "to hunt" off-Reservation upon "the unoccupied lands of the United States," as follows:

> [T]hey shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and the Indians on the borders of the hunting districts.[35]

Pursuant to this treaty clause, the Shoshone-Bannocks retained priority hunting, fishing and gathering rights, including the right to use anadromous fish for food and

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[32] Id. at 719.

[33] 198 U.S. 371, 380-381 (1905).

[34] 273 F. at 95.

[35] 15 Stat. 674.

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other purposes, on unoccupied lands outside their Reservation.[36]

The Idaho Supreme Court unanimously reaffirmed the continuing validity of off-Reservation anadromous fishing rights reserved by the Shoshone-Bannock Tribes in Article 4 of the 1868 Treaty.[37] The court described the dual purposes underlying that Treaty as follows:

> The gathering of food from open lands and streams constituted both the means of economic subsistence and the foundation of a native culture. Reservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farmlands, compulsory education, technical assistance and pecuniary rewards offered in the Treaty. * * * [T]he mere passage of time has not eroded the rights guaranteed by a solemn treaty that both sides pledged on their honor to uphold.[38]

Several judicial decisions have construed the decision in Winters to embrace necessary water to preserve

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[36]Such treaty guarantees are expressly preserved by Article 11.1.9 of the Agreement which provides:

> Nothing in the Agreement shall be so construed or interpreted ... [t]o impair or impede the exercise of any Treaty rights reserved for members of the Tribe pursuant to Article 4 of the [1868 Treaty].

[37]In holding that the "right to hunt" under this provision embraced the continuing right to fish off-Reservation for subsistence and ancestral purposes, Tinno rejected as "entirely discredited" the ruling in Ward v. Race Horse, 163 U.S. 504 (1896), that admission of Wyoming to statehood in 1890 had repealed implicitly the Article 4 right of the Shoshone-Bannocks to hunt upon unoccupied federal land within that state, 94 Idaho at 765 n.6, 497 P.2d at 1392 n.6, including open lands within the Big Horn Basin.

[38]94 Idaho at 766, 497 P.2d at 1393 (emphasis added).

fish and wildlife resources on reservations and in formerly relinquished lands.[39] This doctrinal aspect of Indians' reserved water rights is reflected in several provisions of the Agreement. Specifically, Articles 7.4.1 through 7.4.3 provide that the Tribes shall be entitled to: (1) use water accrued to their federal contract storage rights for instream flows in river reaches on or adjacent to the Reservation; (2) use the natural flows of all the Reservation's interior streams for instream flows; and (3) use as much as 15,000 AFY from the storage water rights in the Blackfoot Reservoir and Grays Lake for instream flows in reaches of the Blackfoot River.

C. CESSION AGREEMENTS

In 1867, President Andrew Johnson's Executive Order designated the Reservation as comprising 1.8 million acres. However, as found in Swim, "[a]lthough the [1868] Treaty called for a Reservation of 1.8 million acres, 'surveying errors' in 1873 reduced its actual size to approximately 1.2 million acres."[40] Between 1880 and 1900, the Tribes were subjected to several cession agreements by the United States which had the effect of further reducing

[39] United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1262 (1984); Confederated Colville Tribes v. Walton, 647 F.2d 42 (9th Cir.), cert. denied, 454 U.S. 1092 (1981).

[40] Swim, 696 F.2d 712, 714 (9th Cir. 1983).

the original Fort Hall Reservation to about 30 percent of its original size.

The current Fort Hall Reservation contains 543,932 acres which are owned primarily by the Tribes collectively (47 percent) and by individual Indians holding allotments subject to restraints on alienation without the consent of the United States (43 percent). The United States holds title to about six percent of Reservation lands, most of which (more than 28,000 acres) were ceded to the United States in 1924 to assure construction of the American Falls Reservoir.[41] Non-Indians own about four percent of current Reservation lands.

II. NEGOTIATION PROCESSES LEADING TO AGREEMENT

Since 1985 the Shoshone-Bannock Tribes, the State of Idaho, private Idaho water users, and the United States have been engaged in negotiations to quantify the Tribes' federally reserved water rights in the Snake River Basin in Idaho. These "Snake River Negotiations" were designed to finally and fairly determine the amount of water to which the Shoshone-Bannocks are entitled to satisfy purposes underlying creation of the Fort Hall Reservation.

In 1983, a majority of the United States Supreme Court held that state courts could exercise concurrent

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[41]See Act of May 9, 1924, 43 Stat. 117.

jurisdiction to adjudicate Indians' water rights reserved under federal law.[42] Given that decision, it was inevitable that federally reserved water rights in the Snake River basin---specifically, the Shoshone-Bannock Tribes' water rights---would be targeted for inclusion in an Idaho state court general stream adjudication.

On October 7, 1984, Idaho's Governor Evans called for legislation authorizing a general stream adjudication of the Snake River "and served notice that "Shoshone-Bannock tribal water rights, as well as the Idaho National Engineering Laboratory's federal water reserve, will be included in the adjudication process."[43] In January 1985, just eighteen months following the decision in San Carlos, the 48th Idaho Legislature was moving to initiate a massive general stream adjudication of the Snake River Basin in Idaho and determining how to raise the estimated $27 million required to underwrite such litigation.

The Tribes, cognizant of the divisive and costly nature of litigation, proposed to the Legislature that the State of Idaho join the Tribes in good-faith, government-to-government negotiations to define and quantify the nature and extent of the Tribes' federally reserved water rights

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[42] Arizona v. San Carlos Tribe, 463 U.S. 545 (1983) (San Carlos).

43B. Bugger, "Evans: Benefits of Agreement Will Outweigh Costs," Idaho State Journal (Pocatello, Idaho: October 7, 1984), 2.

under the Winters Doctrine in the Snake River Basin in Idaho.

In ensuing legislative hearings, considerable discussion occurred, centered around the relative merits of litigation as opposed to negotiation of the Tribes' water rights. The Tribes insisted satisfaction of the Shoshone-Bannocks' reserved water rights through a negotiated process could lead to an agreement which would benefit both Indians and non-Indians. The Tribes and Idaho agreed that they could learn from the mistakes of other states and tribes. The protracted tribal/state litigation in the Big Horn River basin (Wyoming) was cited as the classic example of the divisive and costly result of an all-out attempt by a state to limit or eliminate Indians' water rights. [44]

To its credit, the 48th Idaho Legislature, joined by the Governor, Attorney General, irrigators, and the principal investor-owned-utility, responded with virtual unanimity in supporting a two-year delay of the adjudication in favor of attempting a negotiated settlement.[45] By resolution dated July 17, 1985, the Fort Hall Business

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[44]Early in the negotiations, Teno Roncalio, Special Master of the Big Horn adjudication and former Congressman, referred to that litigation as the "Great Wyoming Shoot-out," with the only winners the "hired guns," and admonished the parties in Idaho to negotiate a mutually beneficial agreement rather than litigate. Snake River Negotiations, Address of T. Roncalio, February 28, 1986 at Hall of Mirrors in Boise, Idaho.

[45]H. Con. Res. 16, 48th Idaho Leg., 1st Sess. (1985).

Council, the duly-recognized governing body of the Tribes, requested that the United States, consistent with federal trust responsibilities to the Tribes, assist and participate in the Snake River Negotiations.

On August 30, 1985, by a Memorandum of Understanding, the Tribes, the State, and the United States agreed to commence good faith, government-to-government negotiations as early as October 15, 1985. On January 10, 1986, the Tribes, the State and the United States agreed to extend that August 30, 1985 Memorandum of Understanding. The parties subsequently made a Technical Studies Agreement establishing a methodology to review the Tribes' reserved water rights claims and to identify matters for further discussion and analyses.

Assuring the participation of private Idaho water users in the Snake River Negotiations was of concern to the governmental parties from the outset. Executive Order No. 85-9, issued by then-Governor Evans, instructed the Chairman of the Idaho Water Resource Board to represent Idaho in the negotiations, and, further, to provide for the effective involvement of interested Idaho water users and other members of the public therein.

On October 31, 1985, the Chairman of the Idaho Water Resource Board, joined by the Tribes and the United States, appointed an Ad Hoc Committee to recommend how best to provide for the effective involvement of interested Idaho

water users and other members of the public in the negotiations. That committee submitted its recommendation for review by the Idaho Water Resource Board on December 6, 1985 and for action by negotiators on December 10, 1985. Thereafter, interested water users were provided access to the Snake River Negotiations on equal footing with the Tribes, the State of Idaho, and the United States.

In the spring of 1986, the Tribes, State, and water users jointly drafted comprehensive revisions to the Idaho water adjudication statute, which provided, inter alia, for a general stream adjudication and allowed for a negotiated settlement of the Tribes' Winters Doctrine claims, as well as all other federal water claims in Idaho, to be submitted to the state court in lieu of litigation claims. The negotiations proceeded with the Tribes, State of Idaho, United States, and interested water users all seated equally at the four-place table, committed to good-faith negotiations, with decisionmaking based on sharing of the best information available.

The approach was, first, to determine the Tribes' water entitlements under the Winters Doctrine, and, second, to satisfy those tribal rights in a manner that minimized adverse impacts on present, non-Indian water uses permitted under state law. Indians and non-Indians came to the bargaining table as equals, intent upon fashioning a mutually-beneficial agreement that was consistent with the

congressional and tribal intentions underlying the Treaty and subsequent tribal and federal agreements.

The negotiations provided an opportunity for the Tribes to measure by an objective and fair standard their entitlement to a reserved water right. The State and water users were given the opportunity to fashion a water agreement that devoted much time and analysis to devising a solution which would substantially minimize impacts on non-Indian water users.

Tribal claims to water for irrigation of Indian lands were based on the number of acres susceptible to sustained irrigation at reasonable cost. Future tribal irrigation systems designed long before the State and the Tribes initiated good-faith negotiations were subsequently adopted by tribal engineering experts due to their economic feasibility. In an agreement saving taxpayers hundreds of thousands of dollars, the parties initially agreed that no further studies of soils were necessary. As a result, the Tribes' claims were based on existing soil studies by the United States Soil Conservation Service and United States Bureau of Reclamation.

The Tribes also presented claims to instream flows and water quality for the Reservation. These claims included water for resident fish and wildlife, maintenance and enhancement of ecosystems, water-based recreational activities, hydroelectric power generation and mining.

Tribal claims were based upon extensive studies by tribal experts of instream flow requirements in the upper and lower Blackfoot River, the upper and lower Portneuf River, and the Snake River bordering the Reservation.46

The Tribes proposed that the parties use the opportunity provided by the water negotiations as a vehicle for implementing "adaptive management" as a policy framework for addressing the various problems, issues and opportunities facing interdependent water users in the upper Snake River basin:

> Adaptive management is a systematic policy framework which emphasizes action and flexibility in establishing instream flow regimes and in protection, maintenance, and enhancement of water quality. Adaptive management adopts a systemwide approach to management of water resources in interrelated ecosystems. It is a policy framework which provides for sensitivity towards existing consumptive and nonconsumptive uses of water resources and allows for the full exploitation of sources of flexibility in managing resources. Uncertainty surrounding biological, economic, and hydrological impacts of instream flow regimes and water quality measures is accepted as a reality and the need to proceed on the basis of the best available knowledge is explicitly recognized.47

The Tribes' claims were subjected to searching and detailed scrutiny by the Idaho Department of Water Resources, its expert consultant engineering firm, Idaho water user groups and their engineering experts, as well as

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46 Shoshone-Bannock Tribes, Presentation of Claims to Instream Flows and Water Quality, May 19, 1987. Instream flows for ceded lands off-Reservation were, initially, deferred.

47 Id. 40-41.

soil scientists from the United States Department of Interior through the Bureau of Indian Affairs and the Bureau of Reclamation.

Negotiators for the Tribes, the United States, the State, and Idaho water users reached an agreement in principle on September 1, 1990, exactly four years after the first Memorandum of Understanding beginning the negotiations was signed on the morning of August 30, 1985. The agreement in principle provided that the Tribes would have the right to divert approximately 580,000 AFY of natural flows and groundwater from a variety of sources, and that 60,000 AFY from the Snake River and Sand Creek would be available for application to non-Indian lands within the FHIIP.

The agreement in principle also stipulated that the Tribes would have the right to "market" approximately 80,000 acre-feet of water from storage space in Palisades Reservoir outside the Reservation above Milner Dam (subject to continuing the exchange of water for diversions from the Portneuf River) and, in addition, would have the right to lease approximately 50,000 acre-feet of water from storage space in American Falls anywhere in the Snake River in Idaho. Tribal water marketing would be arranged through a tribal water bank and the Idaho Water Resource Board would approve tribal rules and regulations governing such transactions.

Following the September 1, 1989 agreement in principle, negotiations focused in large part on clarifying the respective administrative authority and responsibilities of the governmental parties. These discussions focused primarily on the administration of water rights within the Reservation, and administration of the Snake River and the Blackfoot River bordering the Reservation. Agreement on these administrative issues, as well as other unresolved matters, was attained during the spring of 1990 and the Agreement was executed by the parties during the first week of July of that year.

III. SATISFACTION OF TRIBAL WATER RIGHTS AND PROTECTION OF EXISTING USES

One of the most difficult problems encountered in the negotiations was determining the nature and scope of Tribes' reserved water rights given the existing allocation of water resources in the upper Snake River basin. The State and Idaho water users were very concerned that if the Tribes were to exercise a large, reserved water right for Indian lands which are susceptible to irrigation in the future, it would be extremely disruptive to the existing pattern of water use.

From the outset of the negotiations, the Tribes agreed to quantify their reserved water rights in a manner that minimized the impact on Idaho water users. However, the Tribes were unwilling forego water rights for future

lands or to subordinate water rights reserved under the Winters Doctrine as of the date the Reservation was created to existing uses with a junior priority date.

It was also clear from the outset of the negotiations that the inherent conflict between the Tribes' large but unquantified reserved water rights and the system of junior water rights that had evolved in the upper Snake River could not be resolved by construction of additional storage facilities at the expense of the United States. This option was effectively foreclosed by the exigencies of a large and growing indebtedness on the part of the United States Treasury.

Thus, the parties to the negotiations had to develop alternative means of resolving the dilemma posed by the Tribes' reserved water rights for future irrigation, the existing system of allocating water in the upper Snake River basin, and the end of the era of federal largess for new western water storage projects. Resolution of this conflict required a mix of measures, including: (1) a commitment of already existing federal assets to mitigate the impacts of tribal water rights; and (2) agreement on the part of the Tribes to exercise certain reserved water rights in a manner protective of specific existing uses.

A. COMMITMENT OF UNCONTRACTED STORAGE

Section 5 of S. 2870 implements Article 12.3 of the Agreement which authorizes and directs the United States Department of Interior to contract with the Idaho Water Resources Board---or another entity acceptable to the Committee of Nine---for 80,500 acre feet of presently uncontracted storage space in Ririe Reservoir and 18,900 acre feet of uncontracted storage space in Palisades Reservoir. On average, this combined unallocated storage space will yield approximately 45,000 acre feet of water annually.

Article 12.3 of the Agreement provides for "forgiveness of the repayment obligation associated with construction costs" of such uncontracted storage but stipulates that the contracting entity will be required to pay the relative share of the on-going operation and maintenance costs associated with this storage space. The costs of construction are effectively sunk costs and the United States currently does not earn any income to offset operation and maintenance costs, this arrangement will actually result in a net gain of revenue for the United States Treasury.

This commitment of federal assets in the form of uncontracted water supplies is provided, in part, as mitigation for implementation of the Tribal Water rights to natural flow in the Snake River under Article 7.1.1 of the Agreement, as well as mitigation for the impacts on Idaho

water users in the upper reaches of the Snake River which will be felt during water-short years due to the Tribes leasing off-Reservation leasing of water accruing to their federal contract storage rights as provided for in Article 7.3, et. seq..

In addition to the commitment of federal assets in the form of uncontracted water, Article 12.4 of the Agreement contains a provision by which the parties, including the United States, agree "not to unreasonably oppose the efforts of any party to further mitigate the effects of the implementation of the Agreement on existing water users." This provision precludes opposition to reasonable---as opposed to unreasonable---efforts by any part to mitigate impacts, e.g. by construction of additional storage facilities in the upper Snake River basin.

B. MICHAUD PRIORITIES

Article 12.1 recognizes the existing priorities for water rights for both Indian and non-Indian lands affected by the congressional Act of August 31, 1954 (1954 Act).[48] The 1954 Act authorized the 22,000 acre Michaud Division of the Fort Hall Indian Irrigation Project.

Pursuant to Section 3(b)(2) of the 1954 Act, Congress implemented a limited waiver of the Tribes' priority reserved rights to the Snake River and its

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[48]Act of August 31, 1954, c. 1159, 68 Stat. 1026.

tributaries in the amount necessary to irrigate the 22,000 acres in the Michaud Division. In return, Congress provided that the United States would hold in trust for the benefit of the Tribes 46,931 acre-feet of federal contract storage space in American Falls Reservoir and 83,900 acre-feet of storage in Palisades Reservoir for irrigation of the lands in the Michaud Division.[49]

These tribal water supplies and carry a priority date obtained under State law. Space in the American Falls Reservoir Space has a priority date of March 30, 1921 and Palisades Reservoir carries a priority date of July 28, 1939. Under Article 7.3 of the Agreement, the Tribes may market the water accruing to such space.

Section 3(b)(2) of the 1954 Act provides that the construction of the Michaud project works would not be undertaken unless

> appropriate arrangements as may be required under the circumstances are first made * * * which among other things, * * * (2) consent to a priority in time and right in such beneficial consumptive uses of the water of the Snake River, and its tributaries, as are established under the laws of the State of Idaho * * *.

After noting the potential for conflict between water rights to divert natural flows for application to non-Indian lands under State law and Indians' rights under the Winters Doctrine, the Senate Committee Report states:

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[49]The Tribe consented to this exchange as evidenced by Tribal Ordinance No. 1-FY-57, August 31, 1956.

> This bill would not affect the conflicting claims except to the extent of the water rights involved in the project authorized by this bill. It is not to be construed as a waiver by the Indians of any rights to water for any land in the For Hall Reservation under the Winters case, their treaties, or acts of Congress except as to the land in the Michaud Division of the Fort Hall irrigation project, to the extent provided in the bill, and is not otherwise to be construed as a precedent adverse to Indian claims under the Michaud division of the Fort Hall irrigation project to the extent provided in the bill, and it is not otherwise to be construed as a precedent adverse to Indian claims under the Winters case, their treaties or acts of Congress.[50]

C. PROTECTION OF FORT HALL INDIAN IRRIGATION PROJECT ENTITLEMENTS

Several protective measures for water rights appurtenant to non-Indian lands within the FHIIP are included in the Agreement. These provisions are inserted as remarks pertaining to tribal water rights listed in Article 7.1.18(x)(e) for natural flow from Blackfoot River, Article 7.1.19(x)(c) for Blackfoot River storage, and Article 7.1.10(x)(c) for water stored in Grays Lake. Tribal water supplies in the FHIIP will convert to the Winters Doctrine with a corresponding 1867 date of Reservation creation priority date.

Article 12.2 of the Agreement maintains the existing water right priorities for non-Indian lands in the FHIIP and assures these water users that the Secretary will continue to satisfy their existing legal project contract

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[50]S. Rep. No. 2321, 83d Cong., 2d Sess., 3-4 (August 6, 1954).

entitlements consistent with their existing water right priorities. Water users in the FHIIP who are entitled to apply water to non-Indian lands within that project are to be met from the 60,000 AFY Snake River diversion right with a priority of 1891 and 22,000 AFY of storage from the Blackfoot Reservoir with a priority of 1907 as well as Grays Lake, which carries a priority date of 1919.

Expert analysis based on actual historical water supply records indicates that the water supplied to non-Indian lands in the FHIIP will actually be more reliable than in the past. In addition, Article 7.3.8 stipulates that project water users applying water to non-Indian lands will be give a right of first refusal to purchase Tribal water supplies through the to-be-established Shoshone-Bannock Water Bank in the event of shortage. These protective provisions in the Agreement assure that both non-Indian and Indian lands within the project will be provided their water supply consistent with their respective priorities.

D. PROTECTION OF BLACKFOOT RIVER WATER USERS

Some of the oldest water rights held in Idaho permit diversion of natural flow from the Blackfoot for irrigation of off-Reservation non-Indian lands. The Blackfoot River is also one of the most important sources of water for the Tribes. The Bureau of Indian Affairs operates

and maintains two water storage facilities in the headwaters of the Blackfoot River basin: Blackfoot Reservoir and Grays Lake.[51] Water supplies from these two federal storage facilities are released into the Blackfoot River and conveyed downstream to the headgates of the Main Canal and North Canal for rediversion onto the Reservation. The storage water rights in these reservoirs were created pursuant to the congressional Act of March 1, 1907[52] which directed the United States to secure water rights for the project in accordance with State law.

Article 7.1.18 of the Agreement lists the tribal right to divert 150,000 AFY of natural flow from the Blackfoot River. The basis of this right is the Winters Doctrine, with a priority of June 14, 1867. Strict application of this priority water right would have preempted existing water rights for non-Indian lands to natural flow of the Blackfoot River.

To avoid impacting Idaho water users, the Tribes agreed to exercise their water right in the Blackfoot River in a manner that protects their entitlement to divert up to 45,000 AFY of natural flow. At the same time, the Tribes will realize their full legal entitlement under the Winters

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[51]Grays Lake is actually in the Willow Creek basin but water is diverted from Grays Lake into the Blackfoot River basin via Clarks Cut.

[52]Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1024.

Doctrine by supplementing the tribal natural flow rights to divert 150,000 AFY with water accruing to the 348,000 Acre-fee and 100,000 acre-fee of storage in the Blackfoot Reservoir and Grays Lake facilities.

The agreed to process provides for both the Tribes and the non-Indians to divert available natural flows of the Blackfoot River. When natural flows are insufficient to satisfy both Indian and non-Indian natural flow water rights, the Tribes may satisfy the balance of their natural flow rights by diverting water stored in the Blackfoot Reservoir under Article 7.1.19 of the Agreement and/or diverting water stored in Gray Lake under article 7.1.20. In addition, the Tribes may supplement these back-up storage rights by developing the capability to divert groundwater, provided the combined diversion does not exceed the total 150,000 AFY diversion right under the Winters Doctrine.

Thus, when the natural flow of the Blackfoot River is insufficient to meet both Indian and non-Indian demands, the Tribes will switch over to diverting from their storage in Blackfoot River and Grays Lake while non-Indians will continue to use the remaining available natural flow. To assure that all water users receive their full entitlement, the parties have developed a plan to account for and segregate storage rights from natural flow in order to effectuate this arrangement.

E. PROTECTION OF BANNOCK CREEK WATER USERS

The Tribes claim the entire yield of the Bannock Creek basin, both surface and groundwater, under the Winters Doctrine. A strict application of the Tribes' Winters rights to natural flow would be inconsistent with the federal court decree in United States v. Daniels (April 7, 1907), better known as the Bannock Creek Decree. The parties agree to continue historic water allocations pursuant to this decree.

Under the decree, the Tribes retain the earliest priority date for natural flow. This water right, Article 7.1.4, will carry a priority date of June 14, 1867. Thereafter, the decree contains a mix of both Indian and non-Indian water rights, with a corresponding mix of various priority dates. The Tribes hold the majority of these mixed rights which are listed in Articles 7.1.5 through 7.1.12. The basis for all these rights is the Winters Doctrine with the relative shares and priority dates determined by the Bannock Creek decree.

Article 7.1.13 contains the balance of surface water supply in the Bannock Creek basin. This water right is also a Winters right with an 1867 priority date, but it will be delivered subject to the aforementioned "mixed" water rights.

The Tribes' groundwater right in the Bannock Creek basin is listed in Article 7.2.2. This groundwater right is

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a Winters right with an 1867 priority date. In utilizing this 23,500 AFY of groundwater supply, the Tribes agree to exercise this right in a manner that will assure not more than 2,400 AFY of non-Indian groundwater uses upstream in the basin will continue to receive their water supply. Since tribal groundwater uses are downstream in the basin, they are not expected to affect these minimal non-Indian groundwater uses.

IV. CONGRESSIONAL APPROVAL OF THE USE, TRANSFER AND LEASE OF TRIBAL WATER RIGHTS

Section 4 of S. 2870 approves, ratifies and confirms the mix of tribal water rights in the Agreement, including rights to divert natural flows, groundwater and storage water. Section 6 of the legislation specifically authorizes: (1) transfer and lease of tribal water rights within the Reservation; (2) rental of the Tribes' federal contract storage water; and (3) allocation of tribal water supplies for instream flow purposes.

In addition, Section 6: (1) amends the Michaud Act and the Michaud Contract to the extent necessary to authorize such use, transfer and lease of tribal water rights; (2) prohibits taxation, alienation or constraints on any proceeds received by the Tribes for renting water; (3) provides that, except for the rental of water pursuant to the congressional legislation authorizing such activities, no water rights may be sold, leased, rented, transferred, or

otherwise used off-Reservation; and (4) stipulates that no forfeiture, abandonment, loss of tribal water rights as a result of the Tribes exercising---of not exercising---any of their rights to use, transfer, lease or rent their water resources.

A. TRIBAL NATURAL FLOW RIGHTS

1. SNAKE RIVER WATER RIGHT

Article 7.1.1 of the Agreement provides that the Tribes shall have the right to divert 115,000 AFY of the natural flow of the Snake River. 100,000 AFY may be diverted as of the effective date of the Agreement. An additional 15,000 AFY of the Tribes' right to divert natural flow of the Snake River will be phased in over time: (1) as Indian lands not presently irrigated are brought under cultivation; or (2) as ceded lands served by the FHIIP are taken out of cultivation and corresponding water rights for such lands are relinquished by the United States.

The maximum rate at which the Tribes may divert natural flow of the Snake River is, initially, set at 390 CFS. However, this diversion rate will automatically increase to a maximum of 470 CFS at the same relative rate as the volume of the diversion increases from 100,000 to 115,000. The annual volume of consumptive use is 60,986. The priority date assigned to this water right is June 14, 1867, the date of the Executive Order creating the Reservation. The basis

for the tribal water right listed in Article 7.1.1 is the Winters Doctrine.

The natural flow of the Snake River is diverted into the Reservation Canal at the FHIIP's headgates. The maximum rate of diversion is measured at these headgates. This water is subsequently augmented by inflow to the Reservation Canal, primarily by return flow from Sand Creek, upstream of the "Drop" where the diversion volume is measured. This water is injected into the Blackfoot River channel, travels downstream through the Equalizing Reservoir, and is rediverted into the Fort Hall Main Canal and North Canal for delivery within the FHIIP area and is not counted against this water right. The combination of Snake River natural flow diversions and the inflows form Sand Creek will count as part of this water right but only up to the actual demand of the North and Main Canals. Water which is not diverted by the Fort Hall Main Canal or North Canal continues down the Blackfoot River channel and is either diverted by other water users or returned to the Snake River.

The parties recognize that the water flow available from Sand Creek is generally surface runoff and subject to extreme fluctuation. The amount of flow from Sand Creek which is available to satisfy a portion of the Tribal water right in Article 7.1.1 varies depending upon: (1) the active store capacity of the Equalizing Reservoir; (2) the predictability and timing of Sand Creek flow; and (3)

Blackfoot River flow upstream of the point at which water from the Reservation Canal is injected into the Blackfoot River.

The parties estimate that even if the Equalizing Reservoir was rehabilitated so that its active storage was 5,000 acre-feet, approximately 15 percent of the flows from Sand Creek would still not normally be useable to satisfy the Tribal water right to divert Snake River natural flow. Based upon 1989 cost estimates, reconstruction and of the Equalizing Reservoir to provide active storage of 5,000 acre-fee would cost between $5 and $15 million initially and annual maintenance would require an expenditure of about $150,000 each year. The Equalizing Reservoir was originally designed to store approximately 3,000 acre-feet. However, the present active storage capacity of the Equalizing Reservoir is severely limited by sedimentation and other physical characteristics which limit the ability to control Blackfoot River flow.

The parties developed a novel means of allocating Sand Creek flow which avoids the costs of rehabilitating and maintaining the Equalizing Reservoir so as to provide 5,000 acre-feet of active storage. In partial satisfaction of the Tribal right to divert natural flow from the Snake River provided in Article 7.1.1 of the Agreement, The Tribes agree to accept and be credited for that portion of the Sand Creek flow which---given the condition of the Equalizing Reservoir

existing in 1989---can be rediverted by the Fort Hall Main Canal and the North Canal for use within the FHIIP. Eightyfive percent of the computed flow of Sand Creek which is returned to the Snake River because of lack of control provided by the present Equalizing Reservoir---up to a maximum of 50,000 AFY---will be bypassed into American Falls Reservoir for delivery to the credit of the North Side Canal Company in exchange for an equal amount of stored water which that company owns in Palisades Reservoir and/or Jackson Lake Reservoir. This stored water will be released by the North Side Canal Company to meet Snake River diversion requirements of the Tribes and other water users and shall be deemed the first storage water released from American Falls Reservoir by the North Side Canal Company. The remaining fifteen percent of the computed flow of Sand Creek which is not useable by the FHIIP and returned to the Snake River shall be considered as natural flow and credited to downstream water users without any exchange of storage water required.

The quantification of the Tribes' Snake River Water right is based on irrigation of as many as 23,359 acres between mid-March and mid-November of each year. However, Article 7.5 of the Agreement provides that the Tribes may transfer or lease all or any portion of this water right anywhere within the Reservation so long as the transfer: (1) is to any beneficial use; (2) does not exceed the maximum

diversion rate not withstanding the period of use; (3) does not exceed the annual volume of diversion and annual volume of consumptive use; and (4) does not change the water source.

As a special condition on the transfer or lease of the Tribal water right in Article 7.1.1 only, Article 7.7 provides that, 120 days prior to altering the points of diversion or period of use of this Tribal water right, the Tribes will: (1) prepare a written Notice of Transfer; (2) serve a copy of the Notice of Transfer on each member of the Intergovernmental Board established pursuant to Article 9.2; and (3) publish the Notice of Transfer. The publication will state that any person who believes that such a change will injure a water right shall file a timely Notice of Objection with the Intergovernmental Board.

Article 7.8 stipulates that any person claiming that such a change in the point of diversion or period of use of the Tribal water right in Article 7.1.1 will injure another water right shall request mediation before the Intergovernmental Board prior to seeking judicial relief. In any proceeding before the Intergovernmental Board, the person claiming that a change in the point of diversion or place of use has the burden of proving that an injury will occur. If the concensus of the Intergovernmental Board is that the proposed change will indeed injure an objector's water right, it shall issue a recommendation which addresses

measures to mitigate the injury. If the Intergovernmental Board is unable to mediate the dispute, the objector may seek judicial relief.

2. BLACKFOOT RIVER WATER RIGHT

The basis for the reserved Tribal water right to divert natural flow of the Blackfoot River Basin in Article 7.1.18 of the Agreement is the Winters Doctrine. Under the Winters Doctrine, the Tribes shall have the right to divert a maximum of 150,000 AFY with a priority date as of the creation of the Reservation. Maximum consumptive use under this water right is 79,564 AFY. The water supplied under this right can be used to irrigate 53,828 acres of Indian lands which are either presently under cultivation or which may be brought under cultivation in the future or may be transferred and/or leased within the Reservation on the conditions set forth in Article 7.5 of the Agreement.

In exercising the Tribes' right to divert the Blackfoot River's natural flow, the Tribes and the United State agree to ensure that persons diverting natural flows from the Blackfoot River under State law continue to receive as much as 45,000 AFY. Articles 7.1.18(d), 7.1.19(x)(a), and 7.1.20(x)(a). In addition, the Tribes and the United States agree to exercise this right in a manner which does not impair the project entitlements of water users in the

FHIIP. Articles 7.1.18(x)(e), Article 7.1.19(x)(c) and 7.1.20(x)(c).

This arrangement is made possible by the federally-owned storage rights in Blackfoot Reservoir and Grays Lake. Articles 7.1.18(a), 7.1.19(x)(a), and 7.1.20(x)(a). If the water supplied under this right does not provide the full entitlement to natural flow under the Winters Doctrine, the Tribes may divert groundwater within the Reservation without crediting such diversions against any other Tribal water right. If, on the other hand, the Tribes elect to divert natural flow from the Blackfoot River in excess of 150,000 AFY, such excesses are credited against the Tribes' right to divert natural flow of the Snake River in Article 7.1.1.

The Agreement commits the parties to develop a Blackfoot River Management Plan to assist in the implementation of the 1990 Fort Hall Water Rights Agreement in accordance with the Blackfoot River Water Management Plan Statement of Purposes (April 20, 1990). That statement of purposes stipulates that it shall not change any final decree in the Snake River Basin Adjudication as provided for under Article 18 of the Agreement.

3. TRIBAL RIGHTS TO DIVERT NATURAL FLOWS (OR GROUNDWATER) WITHIN THE ROSS FORK CREEK AND LINCOLN CREEK BASINS

The Tribes shall have the right to divert a combination of 10,700 AFY of natural flows from Lincoln Creek and Ross Fork Creek under the water rights in Articles 7.1.2 and 7.1.3 of the Agreement. The basis for both diversion rights is the Winters Doctrine. The Tribes may opt to divert either goundwater or surface water to satisfy such rights, and may exceed limitations on diversions provided that any excesses are credited against tribal groundwater rights in Article 7.2.1. The lease or transfer of the Tribal water rights in Articles 7.1.2 and 7.1.3 are governed by Article 7.5 of the Agreement.

4. BANNOCK CREEK WATER RIGHT

Article 7.1.4 through 7.1.13 list Tribal water rights to divert natural flows of Bannock Creek and tributaries thereto. The basis for such rights is the Winters Doctrine. The combined maximum diversion volume of such rights amounts to 24,384 AFY, of which approximately 77 percent is diverted under the tribal water right listed in Article 7.1.13. The basis for all tribal rights to divert natural flows of Bannock Creek and its tributaries is the Winters Doctrine. The priority date of the water right in Article 7.1.13 is the creation of the Reservation. Priority dates for the water rights in Articles 7.1.4 through 7.1.12 vary according to the priorities for water allocations under

the Bannock Creek Decree. United States v. Daniels (D. Idaho April 9, 1907).

The lease and/or transfer of the tribal water rights to divert natural flows from Bannock Creek and its tributaries are governed by Article 7.5 of the Agreement. The Tribes and the United States agree that the water right in Article 7.1.13 will be exercised in a manner which ensures that persons diverting water under the Bannock Creek decree continue to receive their full legal entitlement.

5. PORTNEUF RIVER WATER RIGHTS

Articles 7.1.14 through 7.1.17 list tribal water rights to divert natural flows of the Portneuf River and tributaries thereto. The basis for each of these water rights is the Winters Doctrine. The priority date for the water right in Article 7.1.14 is the date the Reservation was created. Priority dates for the water rights in Articles 7.1.15 and 7.1.16 vary according to the priority dates established in United States v. Hibner, 27 F. 2d 909 (D. Idaho, E.D. 1928). The priority date for the water right in Article 7.1.17 is per the decree of the District Court of the Fifth Judicial District Court of the State of Idaho, in and for the County of Bannock dated June 5, 1926 in Smith v. City of Pocatello, Case No. 6669.

The point of diversion of the water rights in Article 7.1.14 may be transferred within the Portneuf River

basin upstream from the point the Portneuf River is impounded within the Portneuf Reservoir. Transfer and/or lease of the water rights in Article 7.1.14 through 7.1.17 may occur under Article 7.5.

B. TRIBAL GROUNDWATER RIGHTS

Article 7.2.1 lists the Tribes' right to divert groundwater from any location within the Reservation. The basis for this right is the Winters Doctrine and priority date is the day the Reservation was created. If the Tribes' diversions of natural flows (or groundwater) from the Ross Fork Creek basin or Lincoln Creek basin exceed the maximum volumes set forth in Articles 7.1.2 and 7.1.3, excesses will be credited against this Reservation-wide right to divert groundwater.

Nine wells used to supplement the surface water applied to lands in the Michaud Division of the FHIIP are included in the tribal water right in Article 7.2.1. The Tribes may also divert groundwater for Indian lands within the City of Pocatello and other Indian lands within the Portneuf River basin may also divert groundwater under this right.

In addition to the Reservation-wide groundwater right in Article 7.2.1, the Tribes may divert groundwater from the Bannock Creek basin under Article 7.2.2 of the Agreement. The basis for this right is the Winters Doctrine

and priority date is the date the Reservation was created. The Tribes have the right to the divert the annual yield of surface water and groundwater from Bannock Creek basin, provided that if such combined diversions exceed 48,500 AFY, the excess will be credited against the tribal water right listed in Article 7.2.1

The Tribes and the United States agree to exercise this water right in a manner which ensures that persons diverting as much as 2,400 AFY of groundwater from the Bannock Creek basin continue to receive their legal entitlement.

The Tribes may transfer and/or lease all or any portion of the tribal right listed in Articles 7.2.1 and 7.2.2 in accordance with Article 7.5 of the Agreement.

C. TRIBAL STORAGE WATER RIGHTS

Federal contract storage water rights held in trust by the United States for the benefit of the Tribes are listed for American Falls Reservoir and Palisades Reservoir in Article 7.3.1 of the Agreement. These federal contract storage rights are equivalent to 46,931 acre-feet of storage space in American Falls Reservoir and 83,900 acre-feet in Palisades Reservoir and may be used to irrigate up to 33,938 acres of Indian lands or transferred/leased within the Reservation under Article 7.5.

Article 7.3.2 provides that Indian lands in excess of 33,938 may be irrigated with the water that accrues to these federal contract storage rights if no other water users are injured thereby. Injury is unlikely as water users are generally not entitled to depend upon return flows due to runoff or recharge from another water users application of stored water.

Article 7.3.3 indicates that the Tribes and the Secretary agree to continue the past practice of exchanging water accruing to the federal contract storage rights in Article 7.3.1 for water diverted from the Portneuf River as provided for in Article 8 of the Michaud Contract.[53]

The tribal water rights listed in Article 7.3.1 may also be rented through Shoshone-Bannock Water Bank to be established under Article 7.3.4 of the Agreement and pursuant to congressional approval of such activities as provided in Section 6 of S. 2870. The terms and conditions under which the Tribes may rent such stored water off the Reservation are set forth in Article 7.3.4 through 7.3.12.[54] In addition to renting storage water under Article 7.3, the Agreement provides that the Tribes shall be entitled to allocate the water listed in Article 7.3.1 for instream flows in river reaches on or adjacent to the Reservation.

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[53]See article 8(a) through 8(c) of the Michaud contract.

[54]See discussion of off-Reservation rental of tribal storage rights, infra.

In addition to the Tribes' federal contract storage rights in Article 7.3, the United States hold in trust for the benefit of the Tribes and other water users within the FHIIP federal contract storage water rights in Blackfoot Reservoir and Grays Lake. These storage water rights will be used by the Tribes to supplement the tribal right to divert 150,000 acre feet of natural flow from the Blackfoot River under Article 7.1.18.

The Tribes' storage rights in Blackfoot Reservoir carry a priority date September 3, 1907. The basis of this storage right is the license acquired pursuant to the 1907 Act. The basis of the Tribes' storage rights in Grays Lake are permit number 14247 and R-161 acquired pursuant to the 1907 Act and carry a priority date of August 23, 1919 per the process whereby the United States acquired such rights for the benefit of the Tribes and other water users in the FHIIP.

The Tribes may transfer and/or lease the storage water rights in the Blackfoot Reservoir or Grays Lake under Article 7.5 of the Agreement. In addition, the Tribes shall have the right to use up to 15,000 AFY from the storage water rights in the Blackfoot Reservoir and Grays Lake under Article 7.4.3 of the Agreement.

D. INSTREAM FLOWS ON AND ADJACENT TO THE RESERVATION

Articles 7.4.1 through 7.4.3 indicate that the Tribes shall be entitled to allocate water for instream flows on, as well as adjacent to, the Reservation. Under Articles 7.3.1 and 7.3.3, the Tribes may use storage water accruing to their federal contract storage rights in American Falls Reservoir and Palisades Reservoir, and as much as 15,000 acre-feet of storage in Blackfoot Reservoir and Grays Lake, to maintain and enhance the integrity of ecosystems. Article 7.4.2 provides that the Tribes may use the natural flows of all interior waters for instream flow purposes. In addition, the Tribes may rent water accruing to the federal contract storage water rights listed in Article 7.3.1 outside the Reservation for instream flow purposes under Articles 7.3.4 through 7.3.12 and pursuant to congressional authorization as provided in Section 6 of S. 2870 approving the Agreement.

E. TRANSFER AND/OR LEASE ON OR ADJACENT TO THE RESERVATION

Article 7.5 assures that the Tribes shall have enormous flexibility to apply water supplied from the water rights listed in Article 7 of the Agreement for any beneficial use within the Reservation, provided that such transfers as may occur do not: exceed the maximum diversion rate not withstanding the period of use; does not exceed the annual volume of diversion; and does not exceed the annual volume of consumptive use.

Transfer or lease of such water within the reservation may be for: irrigation; domestic, commercial, municipal or industrial purposes; hydropower generation; recreation; stockwatering; fish propagation; instream flows; and any other uses which provide benefits to the users of such water.[55]

As set forth in Article 7.6, which applies only to the Tribes' right to divert natural flow of the Snake River and Sand Creek, transfer or lease of the water right in Article 7.1.1 may not result in an injury to another water right which is not capable of being mitigated in accordance with the process described in Articles 7.7 and 7.8.

The Tribes agree that water users served by the FHIIP shall be provided a right of first refusal to lease water made available for such purposes within the Reservation.

F. OFF-RESERVATION RENTAL THROUGH Shoshone-BANNOCK WATER BANK

Some of the most significant provisions in the Agreement and the authorizing legislation concern off-reservation rental of storage water through the Shoshone-Bannock Water Bank to be established pursuant to Articles 7.3.4 through 7.3.12. The intent of the Tribes in negotiating these provisions was to confirm the value of

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[55]Article 4.8.

tribal portfolio of water rights. Rental of storage water rights are the most susceptible to off-Reservation rental through a tribal water bank because the legal entitlements of other water users do not already depend on return flows from use of storage.

The commitment of federal assets in the form of allocation of uncontracted storage water to Idaho water users is, in part, mitigation and consideration of the Tribes' ability to rent water off-Reservation. This is especially the case for transactions which deliver water for use below Milner Dam.

During the negotiations, the Tribes made it absolutely clear---and the other parties agreed---that transactions through the Shoshone-Bannock Water Bank might include rental of water for instream flow purposes in the middle and lower portions of the Snake River to protect and enhance anadromous fish runs, as well as provide benefits for resident fish and wildlife.

Such transactions have the potential for creating regional, national and international benefits. In addition, water rented through the Shoshone-Bannock Water Bank for such purposes has the potential to relieve mounting pressures on consumptive water use by Idaho water users in the upper Snake River basin. The success of tribal water rental for purposes such as enhancing and protecting of Columbia-Snake River system anadromous fish should bring

much needed flexibility to existing water allocation mechanisms without requiring a direct attack on existing uses. Moreover, such transactions may create powerful demonstration effects and incentives for other water users to reexamine the manner in which they consume water and take advantage of the flexibility provided by transactions between willing suppliers and purchasers of water supplies.

As part of the bargain struck in the settlement, the Tribes agree that the Shoshone-Bannock Water Bank will be established pursuant to State law. However, there are a number of protections built into the Agreement which are designed and intended to assure that the Tribes will actually receive the benefits to be derived from off-Reservation rental of their federal contract storage rights in Palisades Reservoir and American Falls.

These protections include assurances that there will be no limitations placed on rental of tribal water supplies due to: (1) the Michaud Contract (except for the Portneuf exchange); (2) any potential reductions in the quantities of water available to other water users; (3) any potential conflict with public welfare or local public interest; and (4) any refill penalties for renting water on the terms and conditions set forth in the Agreement.

The Agreement expressly provides that the purposes of Tribal water bank include: (1) beneficial use of tribal water rights; (2) assuring the adequacy of tribal water

supplies; (3) providing tribal funding for water facilities; (4) to allow the Tribes to realize the full economic value associated with their water entitlements; and (5) encouraging good-faith dealing and cooperation among the parties.

The Agreement also provides that a Tribal Rental Pool Committee will be established and will be responsible for operating the Shoshone-Bannock Water Bank. A majority of the membership of the committee will be appointed by the Tribes and will be responsible for establishing tribal priorities for rental of water. The State expressly agrees not to take any action to interfere with any transactions involving off-Reservation rental of water through the Shoshone-Bannock Water. In addition, the Tribes are assured that there will be: (1) no taxation or alienation of the proceeds of any water rental transaction by either State or federal governments; (2) no forfeiture, abandonment, or relinquishment of tribal water rights as a result of any water rental transaction; and (3) no constraints on income which the Tribes may earn from renting its storage water.

Neither the State nor the United States will be subject to any liability for financial losses suffered by any purchaser of water rented by the Tribes. However, the State acknowledges its responsibility to deliver such rented water within any established water district within Idaho and the State has assured the Tribes that, as a result of the

Snake River Basin Adjudication, such districts will be established throughout the length of the Snake River Basin.

Based in part on the aforementioned assurances within the Agreement, the Tribes have agreed that, except as authorized pursuant to Section 6(h) of the authorizing congressional legislation, no tribal water rights or water described in the Agreement will be rented off the Fort Hall Indian Reservation.

G. ADMINISTRATION

Article 8.1 of the Agreement expresses the parties' mutual recognition and respect for the sovereign powers and responsibilities of each respective governmental party, while pledging their commitment to work cooperatively in administering water resources within their respective jurisdiction so as to protect the use of all water rights decreed in the Snake River Basin Adjudication.

Article 8.2 addresses the administrative framework for water resources within the interior of the Reservation, excepting the Snake River and the Blackfoot River which for a significant portion of the northern and western boundaries of the Reservation. Administration of these river reaches is addressed in Article 8.3 and 8.4.

The Tribes shall be responsible for administering all tribal water rights within the Reservation[56] pursuant to

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[56]Article 8.2.1.

a tribal water code.[57] The Tribal water code shall provide for: (1) a Reservation Watermaster; (2) a tribal Water Commission; (3) monitoring and enforcement of tribal water rights.

Pending adoption of the tribal water code, the Secretary will "temporarily" administer the distribution of Tribal water rights within the Reservation.[58]

The United States shall continue to administer the distribution of the water rights for the Fort Hall Project and the Fort Hall Agency from the point the water is delivered to such project facilities.[59]

A minimal number and amount of State law water rights will still exist on the Reservation outside the FHIIP, Fort Hall Agency, and not part of the tribal water rights. Article 8.2.6 provides that these water rights will continue to be administered by the State.

The Blackfoot River is an integral component of the Reservation water supply portfolio. The Blackfoot River provides water from both natural flow and storage for the Tribes and the FHIIP, as well as natural flow for other Idaho water users for non-Indian lands.

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[57]Article 8.2.3.

[58]Article 8.2.4.

[59]Article 8.2.5.

Historically, the Blackfoot River has been administered by the federal water master or officer-in-charge of the federal diversions and federal facilities for the Reservation and the FHIIP. A State watermaster regulated use of natural flow by non-Indians under State law. The federal and State watermasters operate on a shared-cost and shared-authority basis with daily communication during the irrigation season. Although the negotiators and their principals could not agree in detail as to how the Blackfoot River has been administered historically, the parties agree that the water masters on the Blackfoot River have done so without dispute for the past 100 years and continuation of that system is acceptable.

To further eliminate the potential for dispute, the Parties agree to implement the Blackfoot River Management Plan. This Plan is an agreed upon process to compute and measure the flows of the Blackfoot River for the purpose of delineating natural flow from storage to ensure proper accounting of water supplies.

The State shall be responsible for administering water rights in the Snake River. This State responsibility requires maintenance of a complex water accounting system to ensure the delivery of water to all water-users, including the United States and the Tribes, preventing unauthorized or illegal use by other water users.

The Snake River diversion facility referred to in Article 8.4.1 of the Agreement is the headgate of the Reservation Canal, located off the Reservation, diverting flows from the Snake River. While the Agreement expressly reserves exclusive federal authority over the physical operation of these headgates to the exclusion of the State water master, it is understood by the parties that the Tribes may contract operation of the FWIIP from the United States and thereby "stand in the shoes" of the federal trustee and assume exclusive physical control of these project works. In the event of a dispute over any "directions" issued by the State water master to the operator of these project headgates, judicial relief may be sought in the State district court.

Once water is diverted, the distribution of the water will be administered by the United States or the Tribes in accordance with Article 8.2.1, 8.2.5 and 8.3.

Consistent with the pledge to engage in cooperative management in Article 8.1, the parties have set up practical mechanisms for mutual inspection of water monitoring devices and diversions within the Reservation interior pursuant to Article 8.2.2 and 8.2.7, on the Blackfoot River in Article 8.3.3 and on the Snake River in Article 8.4.3. Mutual monitoring of diversions is provided for in Articles 8.2.8 and 8.3.2. Articles 8.5 and 8.6 provide for mutual notice of use of the respective water

rights. Article 8.2.8, 8.4.1 and 8.4.2 provide the reporting requirement of each government to other governments.

Finally, Article 9 creates a forum for the three governments to utilize in communicating, sharing information and resolving disputes arising under the Agreement. Any unresolvable disputes will go before a court de novo.

V. CONTRIBUTIONS TO SETTLEMENT

A. TRIBAL DEVELOPMENT FUND

Section 7(a) of S. 2870 authorizes the appropriation to the Department of the Interior of $2,000,000 each year for the five fiscal years following the effective date of this Act for payment to a tribal development fund. The Tribes understanding is that once such funds are appropriated, the Secretary will promptly deposit the money in an account for disbursement by the Tribes upon request, subject to the provisio that such funds may not be distributed to tribal members on a per-capita basis. This section mirrors the language of Article 13.3 of the Agreement and is an essential part of the compromise struck among the Tribes and the United States.

The federal contribution of $10,000,000 to fund tribal development for the Reservation is very important to the Tribes. Numerous future demands on scarce funds of tribal government will occur as a result of the agreement.

The development fund is necessary to assure that the Tribes receive, over time, the benefits of their reserved water rights.

Article 7 of the Agreement provides that the Tribes are entitled to divert 581,031 AFY for present and future irrigation, DCMI, instream flows, hydropower and stock water uses. A significant portion of the Tribal Water right is for development of future lands. Irrigation of future lands will largely be provided from the following sources: (1) an additional 15,000 AFY as future Reservation lands are irrigated or as corresponding amounts of water diverted for lands owned by non-Indians within the Fort Hall Irrigation project are taken out of production; (2) 19,499 AFY diverted from Bannock Creek over and above present diversions from the Bannock Creek basin; and (3) 125,000 AFY diverted from ground water within the Reservation (10,000 AFY for DCMI).

The irrigation of future lands and use of water for future commercial and industrial purposes will require resources. A primary purpose of the tribal development fund is to provide a portion of the funds necessary to begin development of additional water diversion facilities and distribution works necessary to put the Tribal water right to use.

The ability of the Tribes to generate additional revenue necessary for future development of irrigated

agriculture and DCMI is severely constrained by (1) the limited tax base of the Reservation and (2) the impact of deficit-reduction measures on funds available through federal agencies.

In addition, revenues from phosphate mining at the Gay Mine on the Reservation which presently constitute a significant proportion---as much as 50 percent---of tribal general revenue are expected to decline over the next three to five years as the mine shuts down. During FY 1990 revenues are projected to decline by approximately $500,000. A further reduction $400,000 is anticipated the following year, declining to zero in 1993 with mine closure. This will dramatically reduce revenues available to operate the tribal government and simultaneously displace skilled workers and increase demands on tribal government.

The Tribes have also committed substantial tribal resources to getting a heavy manufacturing company---Sho-Ban Steel---operating. The success of this tribal effort to provide employment for skilled workers is especially necessary in face of closure of Gay Mine. The Tribe have encountered capitalization costs for this tribal enterprise of approximately $1 million and are presently borrowing income from other tribal corporations to keep this enterprise alive.

Faced with declining revenues and increasing demands, the Tribes will be unable to allocate scarce tribal

resources to develop future lands or to provide the start-up funds for new commercial and industrial enterprises which are necessary to receive the full benefits of the tribal water rights.

Supplementation of Blackfoot River Natural Flow and Storage by Diversion of Groundwater requires funds for implementation. It is anticipated that a significant portion of the Tribal Development Fund will be used to develop new groundwater diversion facilities in the Blackfoot River Basin.

The need for such backup diversion facilities derives from the hydrologic conditions of the Blackfoot River basin. Natural flows of the Blackfoot River and storage in Blackfoot Reservoir and Grays Lake constitute a key part of the Tribal water right. However, the yield of the basin fluctuates dramatically depending upon water conditions and the timing of runoff.

To mitigate the impact of wide fluctuations in safe yield and assure that the Tribes receive an adequate supply from the Blackfoot River Basin, the Agreement provides that if the natural flow of the Blackfoot River, supplemented by diversions from storage in Blackfoot Reservoir and Grays Lake, do not supply 150,000 AFY for Indian lands, the Tribes are entitled to supplement natural flow and storage by diverting groundwater.

There are presently no facilities in place for diverting groundwater to supplement Blackfoot River natural flows and storage. Construction of new diversion facilities to supplement Blackfoot River natural flow and storage will (1) assure the Tribes a supplemental water supply sufficient to sustain irrigation during multiple-year droughts, and (2) improve the operating flexibility of the Fort Hall Irrigation Project by allowing a portion of the calls on storage to met from groundwater diversions thereby preserving storage for carry-over.

In addition, implementation of the Agreement and management of the Tribes water rights will place additional demands on existing administrative facilities. At present, there is not enough space available within the Tribal Business Center and Tribal Court to provide office space for The Land Use Department, Administration Office, and Tribal Court. Additional managerial and administrative responsibilities as the settlement is implemented will necessitate construction of additions to the Tribal Business Center. The Tribes' preliminary estimate of the cost of constructing facilities to house additional Tribal staff is $10,000,000. It is anticipated that the costs associated with planning and design of additional facilities and a significant portion of construction costs will be funded from the development fund.

Finally, in implementing the Agreement, the Tribes anticipate a sustained effort to consolidate agricultural lands through purchase of approximately 17,000 acres of lands owned by non-Indians within the Reservation. The estimated cost of this program is $25 million ($1500/acre). The federal contribution to the development fund may, in part, be used to supplement tribal efforts in this area.

B. TRIBAL WATER MANAGEMENT SYSTEM

The federal contribution of $7,000,000 to development of a tribal water management system for the Reservation is a critical element of the bargain which the Tribes and other parties struck in the Agreement. The Tribes view these funds as essentially "sovereignty money" which will allow them to effectively implement the Agreement and manage tribal water rights. Without such federal assistance, the likelihood of the Tribes realizing the full value of their water rights is substantially diminished.

Section 7(b) of S. 2870 authorizes the appropriation of $2,000,000 to be paid in the first fiscal year following the effective date of the legislation approving the Agreement and an additional $5,000,000 payable in not less than equal annual installments in not more than a 20-year period thereafter. The Tribes stress the necessity for the Congress---in addition to approving this provision of S. 2870 and the mirror provision in Article

13.2 of the Agreement---to authorize and actually appropriate such funds, as well as assure that the Department of Interior makes such funds available for disbursement by the Tribes.

Implementation of the Agreement consistent with Tribal self-sufficiency will place significant present and future demands upon the tribal government and corresponding demands on tribal governmental infrastructure. Specifically, the agreement provides that the Tribes will develop a Tribal Water Code and administer the distribution of all Tribal water rights within the Reservation. In addition, tribal management activities and responsibilities will increase as a result of: (1) rental of water stored in American Falls Reservoir through a to-be-established Tribal Water Bank; (2) transfer of points of diversion, periods of use, places of use, and nature or purpose of use; (3) preparation of notices of transfer of Snake River water rights and defense of such transfers against all objectors claiming they will be injured thereby; (4) participating in an Intergovernmental Board created to oversee the implementation of the Agreement and mediate dispute arising among the parties; and (5) allocation of water for instream flow regimes within and adjacent to the Reservation.

C. LAND ACQUISITION FUND FOR GRAYS LAKE

Section 7(c) of S. 2870 authorizes appropriations of $5,000,000 to the Department of Interior for the primary purpose of acquiring available lands and grazing rights adjacent to Grays Lake to enhance the operation and management of the project, making related improvements, and providing collateral benefits for the operation of the fish and wildlife refuge. This appropriation will greatly enhance the flexibility of operations for the FHIIP while simultaneously providing benefits for whooping cranes, an endangered species.

D. PER CAP PAYMENTS

Section 7(d) of the legislation approving the Agreement stipulates that the Tribes may not dispose of any federal contributions to settlement to its members on a per-capita basis. This condition is, apparently, required by federal policy regarding settlement of Indian tribes' water claims. The Tribes have agreed to this provision as a part of the balance struck in the Agreement.

E. LIMITATIONS ON SETTING ASIDE DECREE

Section 7(e) of S. 2870 imposes limitations upon the rights of the Tribes to set aside any final decree confirming the tribal water rights in the Agreement solely because Congress fails to appropriate the funds authorized for tribal development, water management, and acquisition of lands near Grays Lake. The Tribes understand that the

federal executive branch cannot bind the legislative branch. In addition, the State and private water users are unwilling to forego the certainty and stability provided by the Agreement for as long as two decades depending upon whether the federal contributions are actually made available to the Tribes.

Nevertheless, the Tribes are very concerned that the assurances which are provided in the Agreement as well as the legislation ratifying the Agreement do not provide an iron-clad guarantee that the federal contributions to settlement will actually be forthcoming.

It is clear that, in the future, there will be a growing national concensus to reduce the growth rate in the outstanding indebtedness of the United States Treasury by whatever means are necessary. We are very concerned that the tribal expectations of federal contributions to settlement may not be realized given the future course of events and shifting national priorities. This provision puts all the risks of federal deficit reduction measures, e.g., sequestration, squarely upon the Tribes.

F. EFFECT OF INFLATION ON FEDERAL CONTRIBUTIONS TO SETTLEMENT

The agreement does not indicate whether the contributions to settlement are to be adjusted for inflation to maintain real value constant or whether all contributions are "nominal" amounts (unadjusted for inflation). If the

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contributions are "nominal" amounts, all the risk of inflation eroding the real value of the settlement are borne by the Tribes. Federal guidelines for settling Indian water claims through negotiations are silent on the matter of inflation adjustment for federal contributions. However, the guidelines do require such contributions to be spread out over a number of fiscal years. The effect is devalue any federal contributions.

If there is no inflation adjustment, the most serious impacts will be on the Water Management Fund and the Tribal Development Fund. The agreement provides $2 million up front and $5 million over twenty years for the Water Management Fund. The Tribal Development Fund is received in equal amounts of $2 million each year for five years.

TABLE 1: EFFECTS OF INFLATION ON FEDERAL CONTRIBUTIONS, infra, illustrates the effects of inflation on the federal contributions of $17 million to the settlement. These estimations assume that the Tribes will receive federal funds for assistance in developing the tribal water management system in equal amounts of $250,000 for each of the 20 years following the effective date. The impacts on the Grays Lake land acquisition fund are not estimated because there is no way of predicting when such expenditures will occur.

As indicated in the table, if inflation is five percent, the real value of the $17 million of federal

contributions to the Water Management Fund and the Tribal Development Fund is $13,677,996. This represents a loss of real value of $3.332 million. If the inflation rate is ten percent, the real value of the federal contributions is just $11,528,145. This would represent a loss for the Tribes due to inflation of $5,471,855. We can also focus on specific years. Assuming that inflation is five percent annually, the "real value" of the last payment of $250,000 will be $94,223. In other words, the $250,000 we receive in the twentieth year will only get us $94,223 of water management services if we were to buy such services today.

If the inflation rate is, say, ten percent, the situation is even worse. The $250,000 we receive in the twentieth year will only get us $37,161 worth of services at today's prices. For the Tribal Development Fund, the Agreement provides $2 million annually for each of the five fiscal years following the effective date. Assuming an inflation rate of five percent, the real value of the last payment will be reduced from $2 million to just $1,567,052, a loss of $432,948. If inflation is ten percent, the real value of the $2 million payment for the fifth year is just $1,241,843.

TABLE 1: EFFECTS OF INFLATION ON FEDERAL CONTRIBUTIONS

YEAR	MANAGEMENT FUND	DEVELOPMENT FUND	REAL VALUE OF CONTRIBUTIONS 5% inflation	10% inflation

1	2,250,000	2,000,000	4,047,619	1,861,634
2	250,000	2,000,000	2,040,816	1,859,504
3	250,000	2,000,000	1,943,635	1,690,458
4	250,000	2,000,000	1,851,081	1,534,780
5	250,000	2,000,000	1,762,934	1,397,073
6	250,000		186,554	141,118
7	250,000		177,670	128,290
8	250,000		169,210	116,627
9	250,000		161,152	106,024
10	250,000		153,478	96,386
11	250,000		146,170	87,623
12	250,000		139,209	79,658
13	250,000		132,580	72,416
14	250,000		126,266	65,833
15	250,000		120,254	59,848
16	250,000		114,528	54,407
17	250,000		109,074	49,461
18	250,000		102,880	44,965
19	250,000		98,933	40,877
20	250,000		94,223	37,161
	$7,000,000	$10,000,000	$13,677,996	$11,528,145

VI. WAIVER OF CLAIMS

A. FULL SATISFACTION

The Tribal water rights recognized in Article 7 are in full satisfaction of all water rights or claims to water rights of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, their members, and allottees for present Indian lands within the upper Snake River basin above Hells Canyon Dam, Article 10.4. When the Agreement become effective pursuant to its Article 18, the Tribes and the United States shall be deemed to have waived and released any further water rights or claims to water rights for these lands from any sources within the upper Snake River basin other than those set forth in Article 7 of the Agreement.

This release does not apply to water right claims under state law of Tribal members for lands not defined as Indian lands in the Act or Agreement. Article 10.4. This release does not apply to the water right claims of any other Indian tribe, band or community other than the Shoshone-Bannock Tribes at Fort Hall nor to any federal agency other than the Bureau of Indian Affairs, Fort Hall Indian Agency. However, nothing in the Agreement precludes the power of the United States to reserve, or of the United States or the Tribes to acquire land or water rights in the future in accordance with applicable law. Article 11.1.3. In addition, the Tribes expressly reserve certain claims in the Agreement as discussed in Section X Disclaimers, infra.

B. WAIVER OF CLAIMS AGAINST THE UNITED STATES AND NON-FEDERAL PERSONS

The Tribes agree that when the U.S. performs its obligations contained in the Agreement and this Act, including the final payment of funds sought to be authorized in Section 7 of this Act, the Tribes will have waived and released any claims it may have had against the United States as a result of the water rights in this Agreement and for lands or water inundated by construction or enlargement of the American Falls Reservoir prior to July 10, 1990. Article 11.7.

When the final decree is entered confirming the Tribal water rights in the Agreement, the Tribes agree not to make

any claims against non-federal persons for lands or water inundated by construction or enlargement of the American Falls Reservoir prior to July 10, 1990. Article 11.10.

VII. INDIVIDUAL MEMBERS

Consistent with the discussion and testimony in Part VI, supra, the water rights described in the Agreement are in full satisfaction of all water rights claims of members of the Shoshone-Bannock Tribes and allottees at Fort Hall for present Indian lands in the upper Snake River basin. Section 9 of S. 2870 addresses Article 10.4 of the Agreement which provides that since the water rights in Article 7 are based on the amount of Indian lands and the tribal members and allottees at Fort Hall are receiving a water right for these present Indian lands in the Agreement, any individual water right decreed for such Indian lands in the adjudication will be deducted from the Tribal water rights in Article 7 of the Agreement.

VIII. EFFECTIVE DATE

Section 10(a) of S. 2870 controls the disbursement of funds authorized by the Act until the Agreement becomes effective by the express terms set forth in Article 18.

In the legislation approving the Agreement, Section 10(b) makes it clear that no provision of S. 2870 shall be of any force, affect or validity unless and until

all of the events contained in Article 18 of the Agreement have occurred.

For the Tribes, the principal events in Article 18 that must occur before the Agreement becomes effective are: congressional approval of the Agreement; (2) ratification of the Agreement by the Idaho legislature; (3) a vote of the tribal membership approving the Agreement; and (4) entry of the final decree by the State court.

Historically, the Tribes have been subjected to so-called agreements which required varying forms of approval by the tribal government or tribal members. Many of these agreements, rather than protecting the tribal members' interests, actually resulted in severe and substantial losses of tribal resources, including the loss of a portion of their federally reserved water rights for the Reservation, and diminishment of Reservation lands via huge land cessions and a federal survey error reducing the size of the Reservation from 1.8 million acres to its present 544,000 acres.

Understandably, the tribal membership is extremely wary and skeptical of any agreements dealing with their natural resources. The Agreement is no exception. In light of this shameful history of loss by agreement, the tribal membership wishes to make their intent absolutely clear to all parties: this Agreement and this congressional act are totally ineffective unless and until they---the tribal

membership---have had an opportunity to fully review, discuss and analyze its terms and effect, vote to ratify and approve the Agreement.

To insure that there is no misunderstanding on this issue, today the tribal delegation at this hearing seeks an express assurance from the Congress that the Agreement and this Act will not in any way affect their rights and interests unless they vote to approve the Agreement.

IX. DISCLAIMERS

A. WATER CLAIMS OF OTHER TRIBES OR INDIANS ARE NOT AFFECTED

The tribal water rights which are quantified in the Agreement---and the claims which will be satisfied once the Agreement becomes effective---are unique to the Shoshone-Bannock Tribes and the Fort Hall Indian Reservation.[60] Neither the Agreement nor S. 2870 is intended to settle any water right claims of any Indian tribe, band or community other than the Shoshone-Bannock Tribes.[61] Tribal or Indian claims not resolved by the Agreement also include any claims which may be advanced by descendants of pre-1868 Treaty Shoshone and Bannock tribes who were forcibly removed to, or

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[60]See Articles 3.2, 4.26, 4.55, 5.4, 6, 11.1.1, and 11.2.

[61]See Articles 11.1.13 (claims of Northwestern Band of Shoshone unaffected) and 11.1.16 (claims by United States on behalf of other tribes unaffected).

settled upon, Indian reservations other than the Fort Hall Reservation. These may include water right claims of the Duck Valley Reservation on the Idaho-Nevada border and/or the Warm Springs Reservation in Oregon.

B. SHOSHONE-BANNOCK TRIBES' CLAIMS NOT AFFECTED

Nothing in the Agreement, or federal legislation ratifying the Agreement, is intended to restrict any future acquisition or exercise of water rights for present Tribal or allotted lands, apart from the federal-law rights for such lands recognized in the Agreement, if such federal rights grounded in the Winters Doctrine have been fully used when the state-law rights are sought or if the federal rights are not physically available for use through reasonable water diversion facilities.[62] In addition, neither the Agreement nor the legislations approving the Agreement contain or imply any restraints on federal power to otherwise reserve, or federal or tribal power to otherwise acquire, future water rights in accordance with the Agreement and applicable law.[63]

In Article 11.5 of the Agreement, the Shoshone-Bannock Tribes, as well as the United States, expressly reserve the right to assert federal-law claims for instream flows in the Salmon River basin, the Clearwater River basin,

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[62]Article 11.2.

[63]Article 11.3.

and the Snake River basin below Hells Canyon Dam, provided that claims for this purpose by the Tribes, or by the United States on behalf of the Tribes, do not require water to be supplied from above Hells Canyon Dam. Technical studies related to these instream flow claims are now underway, and the parties to the Agreement, by virtue of Article 11.5, are committed to join in good-faith negotiations in an attempt to settle such claims.

Nothing in the Agreement is intended to impair or impede the exercise of any off-Reservation use rights reserved by the Tribes in Article 4 of the 1868 Treaty.64 The hunting, fishing, trading and gathering rights thus reserved form the primary legal bases for the Tribes' instream flow claims that remain for negotiated solution or litigation.

The Agreement is also not intended to resolve or in any way prejudice or waive the parties' contentions regarding the location of the Fort Hall Reservation boundaries on the Snake or Blackfoot Rivers as well as ownership of the beds and banks of those rivers below the ordinary high water mark. Article 11.1.10. The Tribes have long asserted that the Reservation's northern and western borders extend at least to the mid-channel of those rivers, with accompanying tribal ownership of the affected

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64Article 11.1.9.

riverbed/banks. Resolution of any and all differences which may arise between the Tribes and any party is not governed or affected by the Agreement.

Senator BRADLEY. Mr. Funke, we want to move through the hearing. If you could summarize, that would be very helpful.

I might say as well that I am going to be turning the chair over to Senator Inouye. So if I leave before the questioning, it is only because I have three other meetings going on at this exact moment. I am required to be in all three places.

STATEMENT OF HOWARD FUNKE, TRIBAL ATTORNEY, SHOSHONE-BANNOCK TRIBES

Mr. FUNKE. I appreciate that. Mr. Chairman, members of the committee, the strength of this agreement is the balance that is struck in the agreement. The goal from the outset of the parties was to identify water supply for the Tribes under the Winters doctrine, while at the same time doing it in a way that would be sensitive to existing non-Indian uses in the area.

I think this agreement represents that balanced compromise. The agreement represents and respects the separate sovereigns, the State of Idaho, the Federal Government, and the Tribal governments. It provides the Tribes a Federal reserved water supply for the reservation while it protects existing non-Indian uses in the Blackfoot River, Bannock Creek, and phases in portions of the Tribes' water supply in the Snake River.

The water supply in the agreement enables the Tribe to use that water supply through a marketing of their Federal contract storage water in the Federal reservoirs, Palisades and American Falls, through a tribal water bank. The water bank would be operated consistent with State law provisions and the specific provisions in the agreement.

In consideration of this marketing right in article 7.3, the United States has agreed to commit Federal assets in the form of unallocated storage water to mitigate non-Indian impacts as a result of the Tribe marketing this water supply.

There is growing concern within the Snake River region and the Snake River Basin for additional uses of water supplies, and most of the water supply is tied up in an institutional arrangement for consumptive uses. What this water marketing capability for the Tribes will do is allow the Tribes to meet those new needs and alleviate pressure on non-Indian water users by providing that water supply for those other purposes.

The agreement also provides the Tribes with flexible use of its water supply provision, very, very important to the Tribe. We spent a lot of time on this particular provision. In article 4.8, the agreement defines the term "beneficial use" of water supply. The question was asked whether the agreement entails or adopts the Federal definition of "beneficial use." In fact, I think it greatly expands the definition of "beneficial use."

The agreement says that beneficial use is anything that the Tribe says is good for them. They will not waste the water to the detriment of other users, but it is contemplated in the agreement that they can use their water for virtually anything that is good for them, that they believe is good for them, a very expansive use of beneficial use which I think will also benefit the environment and will benefit Indian and non-Indian water users alike.

Another important provision ensuring flexibility of water use for the Tribe is article 7.5, which provides the authority for the Tribes to transfer their water supplies anywhere they are needed within the reservation. The transfer provision in 7.5 allows the Tribe to change its points of diversion, its places of use, its periods of use, or its purposes of use for all of its water rights within the reservation, subject to certain general conditions contained in article 7.5.

In conducting these transfers, the Tribe agrees that, again being sensitive to non-Indian uses, that as to the Snake River water right in article 7.1 they would agree to give notice of any transfers of points of diversion or changes in periods of use for that water supply only, and agree that they would not injure other water rights if they propose to change that place of use or that period of use or point of diversion.

So the agreement gives a lot of flexibility to the Tribe. Much of article 7 lists the elements, the various elements dealing with water supplies used for irrigation purposes. The listing is for the purpose of illustrating how the water supply would be used for irrigation, but it also—all of those water rights in article 7 can be transferred by the Tribes on the reservation pursuant to article 7.5 for any purpose which the Tribe deems is of benefit to them.

The administration of the rights is accomplished through sensitivity for recognition of the authority of each sovereign government, both on and off the reservation, unique understandings between the governments, in addition to foster long-term stability, which is something that all three governments must look at, is what is the stability of this agreement over the long term. The agreement provides for forums to be established so that the agreement will promote and those forums within the agreement will promote communication and cooperation amongst the three governments.

The tribal pool committee contains representatives from all three branches of government. The intergovernmental board is made up of all three governments, and their purpose is designed to provide communication and coordination, as well as attempt to mediate disputes, to prevent confrontations.

Finally, the agreement provides the Tribe with critical funding to enable them to implement the agreement. Sovereignty on paper is as good as water on paper, and what the funding in the agreement does is gives the Tribe sovereign moneys to implement and manage their water supplies at a critical time when they are facing a 50-percent reduction in their general fund revenue.

Any government that would face a 50-percent reduction in their general revenue is in sorry shape, and that is what that government is undergoing this year, a 50-percent reduction in general fund revenue. The development fund is meant to alleviate some of that problem.

I would quickly like to make a point, that I think this agreement was unique. The negotiation process was a unique process. It was accomplished because of the process that was used to negotiate it. We call this process the Snake River model and it has some very fundamental prerequisites for resolving conflict.

It was open negotiation, open meetings. Nothing was hidden, nothing was off limits. The State, the United States, the Tribes

were committed to government-government good faith negotiations. The best information that everybody had was put on the table. Nothing was held back.

The water users were made full parties and represented their own interests at these negotiations. The Tribes were in control of and conducted their negotiations on their own behalf, which is a unique situation, supported by the United States. The Tribe did its own studies and hired its own experts.

The result of that process is this agreement, this balanced agreement. The agreement I think is an example of what the Tribes and the States and the United States and the irrigators, water users, can do, what they can accomplish if they are committed to a fair and open process to resolve conflicts in an open and innovative and creative manner.

A point that the Tribe would like to make is that they believe that these negotiations succeeded because of that fair and open process and the fact that the Tribe played a major role in that process, dealing with local officials, local irrigators. They knew the players in the State legislature. They knew the Committee of Nine. They knew all the interests on the river, and they were all brought to the table.

One of the problems is that the United States Government Department of Interior in March of this year released what they believe is referred to as the criterion guidelines for dealing with Indian water rights. Remarkably, in those criterion guidelines, which were implemented over the Tribes' objections, the United States purports to hold meetings and make decisions and develop strategy and make cuts on Indian water rights without providing in any of those criteria or guidelines for a single, not one iota of tribal input into that process.

That is the very thing that will cause problems for Indian tribes and the United States Government and non-Indian irrigators and State governments, is you start eliminating Indian tribes from the process of deciding and strategizing and protecting their own water supply. It is going to cause problems. That is an unstable situation and it sets the tribes up for a disaster if they are subjected to strict Federal control over the decisionmaking of their water supplies and they are subjected to an incompetent Federal lawyer. They have no recourse.

Luckily, in our case in the Snake River negotiations we had very competent Federal lawyers. Mr. Monson and Mr. Bushman supported the Tribes throughout that process.

But those criterion guidelines ought to be changed or at least looked at by this Congress, because it puts the tribes in a great, great disadvantage, being subjected to total Federal control without the opportunity for input.

Thank you.

Senator INOUYE [presiding]. Thank you very much. Have you completed your statement?

Mr. WARJACK. Yes.

Senator INOUYE. I now recognize Mr. John Rosholt.

STATEMENT OF JOHN A. ROSHOLT, ESQ., NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER, ON BEHALF OF WATER DISTRICT NO. 1, STATE OF IDAHO

Mr. ROSHOLT. Thank you. Thank you, Mr. Chairman. First let me thank both committees for facilitating this. Our bill was introduced fairly late in the year and we appreciate the expeditious setting of a hearing and dealing with the issue.

I am pleased to be here today. My name is John Rosholt. I am a lawyer in Twin Falls, Idaho, and I appear today representing Water District No. 1. Their advisory group is the Committee of Nine and the Committee of Nine is a signatory to this agreement.

I would ask that my official statement be included in the record.

Senator INOUYE. Without objection, so ordered.

Mr. ROSHOLT. Thank you. I will attempt to summarize in the interest of your busy schedule.

Just to give you an idea, attached to my statement on the next to last sheet is a map of the area of Idaho that we are dealing with, superimposed thereon the Fort Hall Indian Reservation, to give everybody a perspective, either appearing in green or a darker color, the areas of that State that are irrigated with waters, either the natural flow waters of the Snake River and its tributaries or from United States Bureau of Reclamation reservoirs. Those areas, exclusive of the reservation, are some 1.2 million acres of irrigated lands.

There are some 8 million acre-feet of water involved in an average water year. There are some 30,000 farmers that receive water deliveries. Using the multiplier we use in our part of the world, multiply that by 5 to come up with the number of people directly dependent upon these farms for their living, approximately 150,000 people.

We are here today to join in this celebration. We are removing uncertainty from these 150,000 people who, ever since the Winters doctrine was announced in 1970, wondered what impact it would have on the Upper Snake Basin. We are here to congratulate Howard Funke, the Fort Hall Tribal Council, and those people who did participate in extreme good faith for 5 years, who set the tone at the beginning, had some pretty hesitant meetings where everybody was afraid to put anything on the table, who were able to pull this off for 5 years, with Clive Strong's help and with the help of the Federal support team, essentially avoiding any major impasse and coming up with what I call a compromise, something that hurts everybody a little bit, but in the long run is a super solution.

Negotiation is always better than litigation. Here we are talking about an agreement which essentially gives the Tribes a known quantity of water that will be available.

The last sheet of my testimony is a short summary of the waters that are now used on the reservation and the waters that can be used after this agreement would be implemented. You will note that the Tribes receive approximately 250,000 acre-feet of water over and above their present usage, to a total of 582,000.

If we use today's market numbers on the Upper Snake Basin, that is approximately $25 million worth of water if you were to go out and buy it at this point in time.

On the other hand, the down side for the water users, the people that I represent, is approximately $10 million, inasmuch as in downside years, even with the mitigation that is included in the bill, there is an exposure of approximately 100,000 acre-feet, and if a 100,000 acre-feet shortfall in a drought year occurs, the potato price being what it is, if you just price the water at $100 an acre-foot, that might not be a fair price, but that is where the water users are exposed.

In addition, in putting the bill together it was determined that the equalizing reservoir, which is a critical part of the delivery system for the Fort Hall Reservation, could be improved substantially by the expenditure of $5 million in Federal funds, and it was determined by OMB and others that that was not appropriate.

The water users worked to eliminate the need to do that, essentially eliminating the need to spend the $5 million by agreeing to an exchange of water whereby we will in fact exchange some of our storage water from an existing reservoir to the Tribes so that we do not have to repair the equalizing reservoir to make it so that it is able to take all of the Sand Creek flows as they come.

This is not a one-way agreement, I think. I think it is good both ways. It is based on diversion and consumptive use. It gives the Tribes flexibility in their consumptive uses. It gives them some ideas as to how they might cover their anticipated revenue shortfalls, and I think in the future they will be a major player in doing some great things in the Upper Snake River Basin.

The last thing I want to mention, and I do not want it to remain unclear because I was probably the cause of it: In the RRA language in the bill, which I have dealt with on page 5 of my testimony, the intention was that, as to the mitigation water in both the Ririe and Palisades, that if that water was made available to a water user entity to mitigate for a shortfall that they would incur because of the implementation of this agreement, that their status under RRA would not change.

In other words, if they are now subject to RRA they would continue to be subject to it, continue to make their reports; if they are now not subject to RRA, the water they receive in mitigation would not cause them to be subject to RRA.

Mr. Chairman, I would like to thank you and the members of both committees for this opportunity and your patience today.

[The prepared statement of Mr. Rosholt follows:]

UNITED STATES SENATE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

SUBCOMMITTEE ON WATER AND POWER

Subcommittee Hearing
September 13, 1990
8:30 o'clock a.m.

Subject: Fort Hall Indian Water Rights Act of 1990
S. 2870

Chairman Bradley, members of the Subcommittee, ladies and gentlemen:

My name is John A. Rosholt. I am an attorney and I reside in Twin Falls, Idaho. I am here today representing the irrigation water users of Idaho's upper Snake River Basin, the area of our state in which the Fort Hall Indian Reservation is located.

I am authorized to appear here today on behalf of Water District No. 01. The Water District is an instrumentality of the state charged with the administration and the delivery of the surface waters of the Snake River and its tributaries in Idaho above Milner Dam which is near Twin Falls, Idaho. In addition to the delivery of the respective natural flow rights of the river, the watermaster delivers the storage water from Bureau of Reclamation Minidoka Project reservoirs to water users of Water District 01, including the Fort Hall Indian Reservation. (Attachment "A" shows the Water District and the Fort Hall Reservation.)

Idaho water districts are created after a court has issued a decree of water rights. There are presently three major decrees that provide guidance for the delivery of Snake River waters above Milner Dam. A McCarran Act adjudication has been initiated in the State of Idaho, which shall eventually redecree all rights and be binding on all users. Assuming favorable consideration by the Congress and the President of S. 2870 which is the subject of today's hearing, the Fort Hall Indian Water Rights Act of 1990 shall become an integral part of the adjudication court's final decree. This action, which is specifically defined in Article II(c) of the Bill, brings together all the parties necessary to create a full and binding decree as to the water rights in the Snake River Basin in the State of Idaho.

Mr. Chairman, five years ago (prior to when state leaders initiated the McCarran Act adjudication action in the State of Idaho) it was easy to determine that perhaps the most serious and difficult obstacles to overcome would be the resolution of Indian and federal water right claims within the State of Idaho. Federal ownership in the State of Idaho is approximately 64 percent. Obviously, the federal government has a substantial interest in water rights within the boundaries of the State of Idaho. State leaders elected to first attempt negotiations with the Shoshone-Bannock Tribes of the Fort Hall Reservation, even while we were arguing about the scope of the adjudication. Everyone recognized that this claim

would probably be the largest and most complex of all those involved in the adjudication. Pursuant to a memorandum of understanding, the state and the Tribes proceeded to begin early discussions. The Committee of Nine, the advisory committee to Water District No. 01, was concerned that the water right holders and users be included in the negotiations. Their concerns stemmed from the fact that essentially all of the waters of the upper Snake River Basin has been previously decreed and that the assertion of an 1867 Winters Doctrine Claim by the Shoshone-Bannock Tribes would result in less available supply and substantial changes in the status quo. After an appropriate petition, the water users were allowed to participate and did thereafter participate in all of the negotiations over the five year period.

Participation by the water users provided a vehicle by which concerned water users could be kept current on the status of the negotiations. The Water District encompasses some 1.2 million acres which receive water for irrigation purposes. Diversions in Water District 01 managed by the watermaster number 600. In good water years, some 8 million acre feet are accounted for. There are an estimated 30,000 farms which directly support 150,000 farm family members that benefit from the use of irrigation water in Water District 01.

The distinguishing mark of the Idaho negotiations from the outset was the good faith effort of all the parties. Representatives of the Tribes, Justice, Reclamation, BIA, State

of Idaho and the water users never reached a major impasse in the negotiations. The Tribes set the cooperating tone by bringing former Wyoming Congressman Roncalio to one of the early meetings. The Congressman encouraged all toward negotiation and indicated the horror stories that had been encountered in other parts of the west. Most of the parties were aware of the negotiations and litigation which were going forward in the west. The parties were able to benefit from the experience of others. The fact that Idaho is in its fifth consecutive year of drought makes the success of the negotiations even more amazing.

Bottom line, I think all of the parties view the settlement as a compromise. The lawyers define compromise as an agreement where everyone gets hurt a little bit. In my personal opinion, the reason the Agreement was finalized is that in everyone's analysis it was not a lot different than the result that probably would have occurred had the parties resorted to litigation. There is just one minor difference . . . about $10 million to $20 million in legal costs . . . . not to mention accompanying inordinate delays.

S. 2870 is one of the last remaining conditions for implementation of the Settlement Agreement. The Agreement will validate parameters that have been worked out in the negotiations that provide for the phase-in of the Tribal water rights and flexibility to the Tribes in the use of those

rights. Attachment "B" shows a summary of the present and future authorized uses for the reservation.

The Agreement permits additional future diversion of 258,193 acre feet to a total diversion of 581,031 acre feet for uses on the reservation. At full development, there will be impacts and shortages to existing users. While some have estimated those impacts to be as much as 100,000 acre feet in a drought year, Section 5 of the Bill and the transfer of previously unallocated storage space to the users will help mitigate those impacts. Water user organizations also have a paranoia that the Reclamation Reform Act rules will be reapplied to those who are otherwise exempt but would receive some of the mitigation water which would be made available. In that regard, it is likely that Section 5(a) of the bill provides a double exemption from the Reclamation Reform Act because of that paranoia. It is likely that the words "deemed repaid" are enough to insure that the Reclamation Reform Act would not apply. However, the bill goes on to say after the "provided" that it is not intended by this Act to change the application of the Reclamation Reform Act to any user who receives mitigation water. Perhaps clarification of that hiatus can be dealt with in the committee report.

As this Committee well knows, western state water laws are sometimes very constrictive. This Agreement facilitates some uses of water by the Tribes for purposes other than those generally considered traditional. Flexibility for instream

flows, leasing for fishery purposes and changes in nature of the use were written into the Agreement. Some of these permissions transcend the traditional and overcome institutional constrictions. The water users' bottom line protection is that the whole Agreement is keyed to diversion and consumptive use rates. Changes in nature of the use on the Reservation without injury will be facilitated. The Agreement provides the Tribes with better options for future development. One of my personal clients has agreed to an exchange with the Tribes to facilitate an alternative solution to an expensive fix to Equalizing Reservoir, the Tribes' regulating reservoir. Their consent to this exchange may have saved the United States as much as $5 million in construction costs in rehabilitating the Tribes' reservoir, as well as substantial future operation and maintenance costs.

There is no question, there will be less water available for diversion by non-Tribal members in the upper Snake River Basin when the Agreement is in effect. Let there be no question about the fact that the Tribes will benefit from this Agreement. The water users too benefit by the elimination of the uncertainty of the quantity of the Tribal right and have the advantage of quantifying their own water rights and resolving several interfaces which have existed in the operation of the Snake and Blackfoot Rivers for many years.

In essence, we think the Agreement is fair for all concerned. My major purpose in being here today is to advise

that the water users, those who will actually give up the water, are in support of Senate Bill 2870. We encourage your support of expeditious action on S. 2870.

Thank you for the opportunity to testify today. Please file my complete statement in the official record of this hearing. I would be pleased to attempt to answer any questions that the Chairman or members of the panel would have.

John A. Rosholt

JOHN A. ROSHOLT

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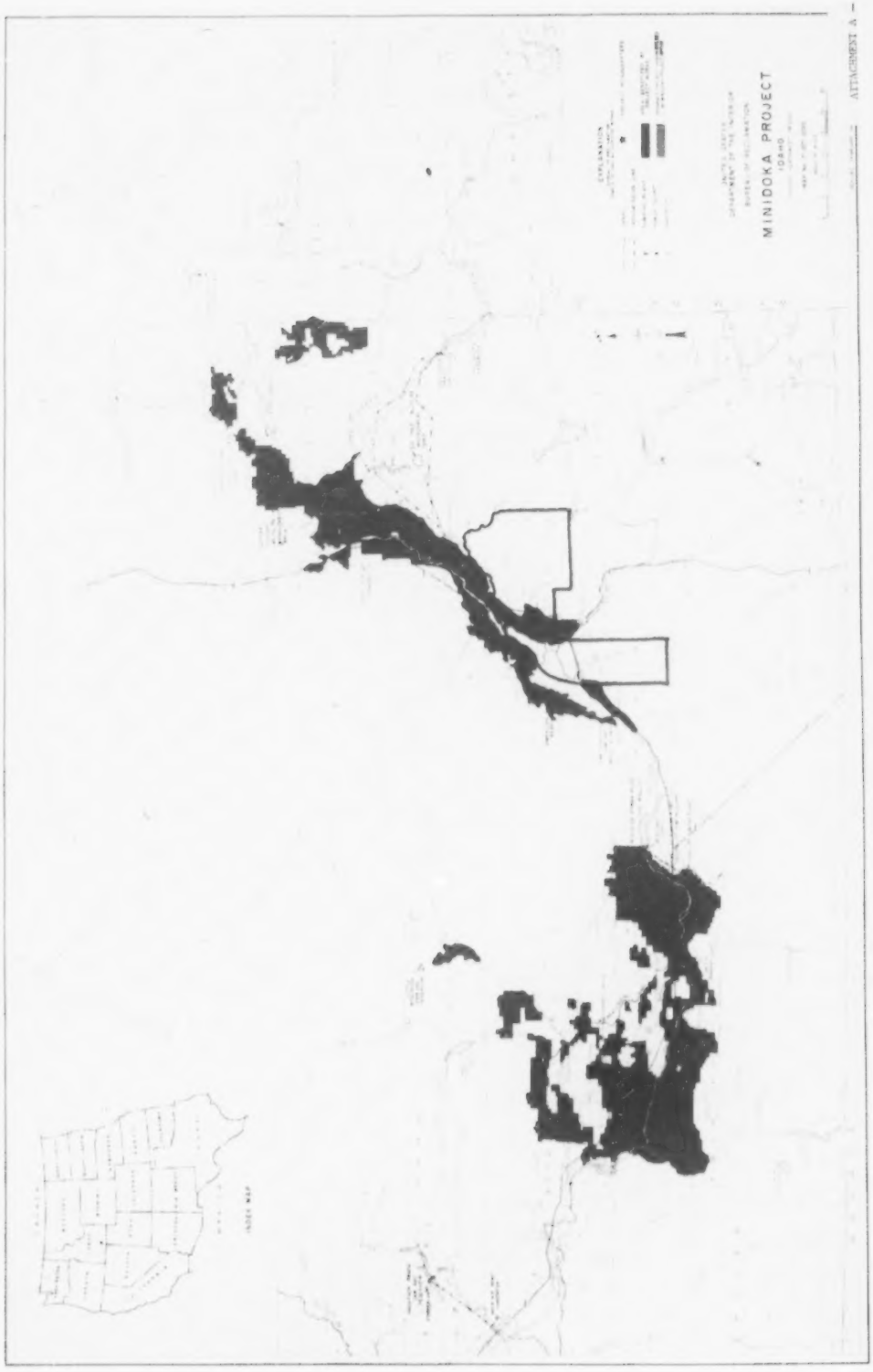
MINIDOKA PROJECT
ATTACHMENT A

SUMMARY OF RESERVATION WATER RIGHTS

DESCRIPTION	ACREAGE				WATER (AC-FT)				CONSUMPTIVE USE (AC-FT)			
	SURFACE WATER		GROUND WATER		SURFACE WATER		GROUND WATER		SURFACE WATER		GROUND WATER	
	PRESENT	FUTURE	PRESENT	FUTURE	PRESENT	FUTURE	PRESENT	FUTURE	PRESENT	FUTURE	PRESENT	FUTURE
BANNOCK	652	5598		6704	2603	22392		23500	1552	13323		17843
LINCOLN	852			849	3408			2292	2028			1740
ROSS FORK	725			778	2900			2103	1726			1594
BLACKFOOT	28509				150000				76842			
SNAKE	5334	19985			28067	66933			14378	49312		
UPPER PORTNEUF	192	115			626	374			372	223		
LOWER PORTNEUF	13517				42000				29153			
GROUNDWATER W/O DCMI			32307	10285			87229	27771			66229	21085
STORAGE		20421				88831				59389		
GROUNDWATER DCMI							6000	4000			3780	2520
TOTALS	49781	46118	32307	20616	229609	138530	93229	59663	126051	113247	70009	44783

PRESENT ACREAGE TOTAL	82088	ACRES
PRESENT DIVERSION TOTAL	322838	ACRE-FEET
PRESENT CU TOTAL	196060	ACRE-FEET
FUTURE ACREAGE TOTAL	66734	ACRES
FUTURE DIVERSION TOTAL	258193	ACRE-FEET
FUTURE CU TOTAL	158029	ACRE-FEET
GRAND TOTAL ACREAGE	148822	ACRES
GRAND TOTAL DIVERSION	581031	ACRE-FEET
GRAND TOTAL CU	354089	ACRE-FEET

ATTACHMENT B

Senator INOUYE. Thank you very much, Mr. Rosholt.

I have been requested by Chairman Bradley to ask the following questions. Mr. Strong, why did not Idaho's Director of Water Resources sign this settlement agreement?

Mr. STRONG. The reason the Director of the Idaho Department of Natural Resources did not sign the agreement is that he was not directly involved in the negotiations. He serves as a court advisor in terms of the adjudication. It was felt appropriate that the actual participation from the State should come from not the Director of the Water Resources, but the Idaho Water Resource Board, which is responsible for the planning of waters in the State of Idaho.

Senator INOUYE. Will he be bound by this agreement?

Mr. STRONG. Yes, he will.

Senator INOUYE. Will he be absolutely bound by it once it is ratified by the legislature?

Mr. STRONG. Yes, he will.

Senator INOUYE. Will he have any authority to modify the agreement?

Mr. STRONG. No, he will not.

Senator INOUYE. Under this agreement will the State of Idaho have any authority to administer water within the Fort Hall Reservation?

Mr. STRONG. The administration of water rights will occur as provided in the agreement. Within the exterior boundaries of the reservation, the agreement provides that the Tribes will administer their tribal water rights; the State will administer State-created water rights.

Senator INOUYE. I thank you very much.

Mr. Osborn, just for clarification, am I correct that neither this act nor the agreement will become effective until the tribal membership votes to approve the agreement?

Mr. WARJACK. That is true, sir.

Senator INOUYE. Am I also correct from your testimony that you favor the immediate passage of this measure?

Mr. WARJACK. Yes, we did at the council meeting.

Senator INOUYE. Mr. Funke, that is the position of the council?

Mr. FUNKE. Yes, Mr. Chairman. It is very important. The tribal members in the Shoshone-Bannock Tribe have suffered a series of losses of land and water resources over the past 100 years pursuant to agreements, and there is very much skepticism on the reservation in entering into agreements of any kind.

So what the tribal members are asking is that the committee or yourself, sir, give an express assurance to the representatives from the Tribe here today that this agreement and the legislation relating to the agreement are not to become effective unless and until the tribal membership votes to approve the water agreement.

They are looking for an assurance, an express assurance from the committee, that that is in fact the case, and they have in fact asked a representative of the Fort Hall Business Council, Mary Washakie, who is here and would very much like to make a short statement if that is possible to that effect. I realize the committee is very short on time and it is a very busy time. This is a history-making situation for those people.

Senator INOUYE. Mr. Funke, you have indicated that time is of the essence. When will the Tribe meet to vote upon this measure?

Mr. FUNKE. We assume—that is up to the council, the Business Council. But I would assume it would be consistent and concurrent with the legislature, the Idaho State legislature's approval, or their entertaining of the agreement.

Senator INOUYE. I should point out that the leadership of the Congress ambitiously is planning to adjourn on October 5. Senator McClure and I do not think this will happen, but that is what they have said. But I am certain it will not go beyond the middle of October.

We have no assurance whether we are coming back after the election. I hope not. That being the case, if your Tribe is not prepared to advise us on its membership decision by, say, within a week, you may be out of the ballgame because suddenly we are going to be deluged with the budget, with appropriations, with Judge Souter, and there might not be too many slots open for Fort Hall Reservation.

Mr. FUNKE. Let me clarify that, Mr. Chairman. The Fort Hall Business Council, which is a duly authorized representative body, governing body of the Tribe, has endorsed the agreement. What the tribal membership will do, they are seeking support from these committees for this bill and passage of the agreement by Congress.

What the people at the reservation are concerned about is that the agreement ultimately, simply by Congress passing this legislation would not make this agreement law. They want the opportunity to approve or reject the agreement after fully considering its provisions.

So they are supporting the agreement and they want Congress to pass on the agreement as soon as possible. But they just want the assurance that when Congress does approve the agreement that it does not become self-executing and become effective without their approval. They want the opportunity to review it and approve it at their own speed, and the provisions in the agreement provide for their approval and state that the agreement would not become effective unless they were to vote to approve it.

So they just wanted that assurance from the committee, that that is in fact your understanding, that the agreement would not become effective pursuant to article 18 until they voted to approve it.

Senator INOUYE. Well, article 18 is part of the bill itself.

Mr. FUNKE. Yes.

Senator INOUYE. If we pass the bill, article 18 becomes part of it.

Mr. Strong, I believe if I heard you correctly you said that the Tribes' claims would not be extinguished until all the funds are appropriated.

Mr. STRONG. Mr. Chairman, that is correct. I direct your attention to section 8(b), line 25. It says: "In consideration of performance by the United States of all actions required by the agreement and this act, including the Congressional authorization, appropriation, and payment of any funds authorized in section 7 of this act, the Tribe shall be deemed to have executed in return a waiver."

So that waiver does not become effective until each of those conditions are satisfied: authorization, appropriation, and payment.

Senator INOUYE. Yet the Attorney General indicated that once the matter is passed and the parties agree to it he will go to court to get a partial final decree, and upon passage of that section 7(e) becomes effective, does it not?

Mr. STRONG. That is correct, Senator.

Senator INOUYE. Then if 7(e) goes into effect, even if we do not appropriate the money, all claims are gone.

Mr. STRONG. That is incorrect, Senator. What happens is, once the agreement becomes effective, let us assume that the decree is accepted by the court, then the water rights agreement becomes effective. However, there still remains a claim by the United States. In fact, it is, I guess probably the best characterization, the liquidated damages claim that we put into this agreement; $22 million is what the Tribes will receive.

They will be entitled to seek that in the Court of Claims, or at least that is the intent of the parties, that they would be able to seek that in the Court of Claims if Congress fails to appropriate the moneys, and that this waiver in section 8(b) will not become effective until that money is in the Tribes' possession.

Senator INOUYE. That is your interpretation?

Mr. STRONG. That is our interpretation.

Senator INOUYE. Can that interpretation be incorporated in this measure, so that all ambiguity be taken away?

Mr. STRONG. Senator, the State would have no objection to the incorporation of that provision in the agreement. There is a number of ways to accomplish the objective, but I wanted to make clear to the committee that we had provided for that contingency.

Senator INOUYE. Senator McClure.

Senator MCCLURE. Thank you very much.

I would address this question to all the parties at the table, because I think we need to have a common understanding. I think there is one, but I want the record to reflect it. My understanding of the legislation is that section 8(b) provides that the full payment of all sums in consideration for the extinguishment of all claims and that a failure to appropriate or pay the amounts would not result in reviving the claims, but rather would result in a suit in the Court of Claims for liquidated damages based solely on the failure by the U.S. to pay the consideration.

That judgment would be satisfied from the claims fund. Do you all agree with that interpretation of the provisions of this legislation?

Mr. STRONG. Senator, the State of Idaho, as the State of Idaho's representative, that would be our understanding of what is intended by the provision.

Senator MCCLURE. Mr. Funke?

Mr. FUNKE. I guess, Senator McClure, whatever provision is necessary, whatever understanding of that provision is necessary in order to ensure that the Tribes in fact get the benefit of their bargain is what the Tribe wants to see happen. Whether that requires clarifying language or discussion on the record of the relative understanding of the parties, whatever it takes to ensure that they get their funds that they very badly need—my understanding of the provision, if it is the common understanding of the parties, I would agree with that.

Senator McCLURE. Mr. Rosholt?

Mr. ROSHOLT. I agree, Senator.

Senator McCLURE. Any other statement on behalf of the Tribe? Do you understand it in that fashion?

[No response.]

Senator McCLURE. Thank you very much.

Thank you, Mr. Chairman. I have no other questions.

Senator INOUYE. I thank the panel very much and this matter will now be considered by the full committee, and I hope that it can be expedited.

Yes, Mr. Strong?

Mr. STRONG. Mr. Chairman, if I might for the record point to a typographical error in the bill on page 13, line 15. The word "ensure" is used. It should be "inure".

Senator INOUYE. It is noted. Thank you very much.

On behalf of the Energy Committee, this hearing is adjourned.

[Whereupon, at 10:15 a.m., the committees were adjourned.]

[Additional materials submitted for the record have been retained in subcommittee files.]

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